DOCKET

(15)

No. 88-1260-CFX
Status: GRANTED

Title: Citibank, N.A., Petitioner
v.
Wells Fargo Asia Limited

Docketed:
January 25, 1989

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Lerman, Arnold M., Bork, Robert H.

Counsel for respondent: Snider, Darryl

Entry	Date	Note	Proceedings and Orders
1	Dec 8 1988	G	Application (A88-463) to extend the time to file a petitio for a writ of certiorari from December 26, 1988 to February 18, 1989, submitted to Justice Marshall.
2	Dec 12 1988		Application (A88-463) granted by Justice Marshall extending the time to file until January 25, 1989.
3	Jan 25 1989	G	Petition for writ of certiorari filed.
5	Feb 15 1989		Order extending time to file brief of respondent on th merits until March 18, 1989.
6	Feb 24 1989		Brief amici curiae of New York Clearing House Association, et al. filed.
7	Mar 17 1989		Brief of respondent Wells Fargo Asia Limited in opposition filed.
8	Mar 22 1989		DISTRIBUTED. April 14, 1989
9	Mar 27 1989	X	Reply brief of petitioner Citibank, N.A. filed.
10	Apr 17 1989	P	The Solicitor General is invited to file a brief in th case expressing the views of the United States.
11	Nov 2 1989		Brief amicus curiae of United States filed.
12	Nov 8 1989		REDISTRIBUTED. November 22, 1989
14	Nov 13 1989	X	Supplemental brief of respondent Wells Fargo Asia filed.
16	Nov 27 1989		REDISTRIBUTED. December 1, 1989
17	Dec 4 1989		Petition GRANTED.
			***
18	Jan 18 1990		Brief amici curiae of New York Clearing House Association, et al. filed.
19	Jan 18 1990		Brief of petitioner Citibank, N.A. filed.
20	Jan 18 1990		Brief amicus curiae of United States filed.
21	Jan 26 1990		SET FOR ARGUMENT MONDAY, MARCH 19, 1990. (3RD CASE)
22	Feb 2 1990	G	Motion of the Solicitor General for leave to participat in oral argument as amicus curiae and for divided argument filed.
23	Feb 20 1990		Motion of the Solicitor General for leave to participat in oral argument as amicus curiae and for divided argument GRANTED.
24	Feb 20 1990		Joint appendix filed.
25	Feb 20 1990		Record filed.
		*	Certified copy of original record and proceedings, 2 boxes, received.
26	Feb 20 1990		Brief amici curiae of Bank of Montreal, et al. filed.
27	Feb 20 1990		Brief of respondent Wells Fargo Asia Ltd. filed.
29	Feb 23 1990		Record filed.
		*	Certified copy, 1 volume, district court documents 1-15, received.

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No. 88-1260-CFX

Entry	Date	Note	Proceedings and Orders
28	Feb 27 1990		CIRCULATED.
30	Mar 7 1990	X	Reply brief of petitioner Citibank, N.A. filed.
31	Mar 19 1990		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1260 (1)

No. ——

Supreme Court, U.S.
FILED
JAN 25 1989
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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITIBANK, N.A.,
Petitioner,
v.

WELLS FARGO ASIA LIMITED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, contrary to the design of federal banking regulation, a U.S. bank may be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits. (This is the same question as that presented in *Citibank, N.A. v. Trinh, petition for cert. pending*, No. 88-1031 (U.S. filed Dec. 20, 1988).)

2. Whether, contrary to federal banking law and policy, the use of standard instructions to route funds through the New York bank accounts of foreign depositors constitutes an agreement by U.S. banks to be liable for deposits in their foreign branches when the deposits are taken or frozen by foreign governments.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

CITIBANK, N.A.,
Petitioner,

v.

WELLS FARGO ASIA LIMITED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Citibank, N.A. ("Citibank") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 852 F.2d 657. The order of the court of appeals denying petitioner's petition for rehearing and

[1] Citibank is a wholly-owned subsidiary of Citicorp. The only subsidiaries or affiliates of Citibank whose stock may be publicly held are: Banco Honduras, S.A., Banco Internacional de Colombia, S.A., Central Holdings Corp., Citibank Espana, S.A., Citibank Italia, S.p.A., Citibank Portugal, S.A., CityTrust Banking Corp., Compagnie Generale de Banque Citibank, Famibank, S.A., Fuyo General Lease Co., Ltd., KKB Bank AG, Saudi American Bank, Taiwan First Investment & Trust Co., Ltd., and the United Bank of Trinidad and Tobago Limited.

suggestion for hearing *en banc* (App. B) is unreported. The second opinion of the district court on the merits (App. C) is unreported. The order of the court of appeals directing a limited remand (App. D) is unreported. The first opinion of the district court on the merits (App. E) is reported at 660 F. Supp. 946. The opinion of the district court denying respondent's motion for summary judgment (App. F) is reported at 612 F. Supp. 351.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1988, and the order denying rehearing was entered on September 27, 1988. The petition for a writ of certiorari was therefore originally due on December 26, 1988. By order of Justice Marshall dated December 12, 1988, the time for filing the petition was extended to January 25, 1989. This Court has jurisdiction to issue the requested writ under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are reprinted at Appendices G-K.

STATEMENT

One of the cornerstones of modern international banking is the financial and regulatory distinction between deposits of U.S. dollars abroad and deposits of U.S. dollars in the United States. The court of appeals decision in this case wipes out this distinction. It does so based simply on boilerplate instructions used to route repayment of foreign deposits of U.S. dollars through bank accounts in New York. From such instructions, the court of appeals has fashioned a supposed agreement by any bank holding U.S. dollar deposits outside the United States to repay the deposits out of assets located in the United States if a foreign government has seized or frozen the deposits.

This decision has great impact on banks all over the world. In particular, as stated by the United States government, it is "of great concern to the nation's banking system" and "implicates the interests of federal regulatory agencies responsible for oversight of the American banking industry." Brief for the United States as Amicus Curiae at 11, *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988) (No. 87-7685).

The Transaction in this Case

Singapore brokers acting for respondent Wells Fargo Asia Limited ("WFAL/Singapore"), a Singapore bank wholly owned by Wells Fargo Bank, N.A., agreed in June 1983 to make two deposits of $1 million each with petitioner Citibank's foreign branch in Manila ("Citibank/Manila"). The agreements of deposit were made by telephone and subsequently confirmed by telex messages. The oral agreements specified that Citibank/Manila would repay the deposits, plus interest at a stated rate, in December 1983. The later confirmations also contained instructions that the electronic transfers of the deposits and the intended repayments would be routed through U.S. dollar accounts held by WFAL/Singapore and Citibank/Manila at their respective correspondent banks in New York. Upon transfer of the funds from WFAL/Singapore's account with Wells Fargo Bank, N.A. in New York to the account of Citibank/Manila with Citibank in New York, the funds became part of the assets of the Manila branch, which used the dollars in its Philippine operations subject to the banking laws and regulations of the Philippines.

The transaction between WFAL/Singapore and Citibank/Manila was a typical "Eurodollar interbank placement." "Eurodollars" are simply U.S. dollars deposited with financial institutions outside the United States. App. at 42a. "Interbank placements" are short-term deposits made by one financial institution with another. App. at 16a-17a.

The vast majority of Eurodollar interbank placements follow the pattern of the two placements made by WFAL/Singapore with Citibank/Manila at issue here. They are made orally in a market, much like a stock or commodities exchange, involving "bid and asked" terms.[2] Usually they are deposits of large sums, most often $1,000,000 or more, placed over the telephone by bank traders or authorized brokers. Discussions typically are limited to the amount and currency of the deposit, the date of repayment, and the interest rate to be paid. App. at 45a. The oral agreements are followed within a day or two by the exchange of telex "confirmations" that recite these particulars and contain instructions for the routing of funds from the depositor to the foreign branch and the return routing to the depositor on withdrawal. Almost all Eurodollar placement funds pass through bank accounts in New York maintained by the foreign branch (or bank) and the depositor, and the standard routing instructions therefore refer to the transfers of funds between such New York accounts. App. at 16a.

Eurodollar interbank placements play a major role in the continued operations of foreign branches of U.S. banks. These branches function as foreign banks: they are licensed and regulated by the government of the foreign country, they lend funds there, and they obtain funds by taking deposits there. Some of these funds are in the currency of the country where the branch is located; others, such as the funds in this case, are not. Eurodollar interbank placements with foreign branches of U.S. banks at present amount to over $40 billion—close to 20% of their total deposit funding.[3] The availability of such funds provides a critical source of short-term, liquid funds to foreign banks and foreign branches of U.S. banks, thereby facilitating the efficient flow of capital around the world.

[2] *See, e.g.*, App. at 15a; Testimony of Mr. Donald S. Howard, Tr. 448-50; Testimony of Dr. Gunter Dufey, Tr. 475-79, 638; Testimony of Mr. Will Christopher Wood, Tr. 810; Testimony of Mr. Rodney B. Wagner, Tr. 1087.

[3] 74 Fed. Res. Bull. A55 (Dec. 1988); Brief for the United States as Amicus Curiae at 2, *Wells Fargo, supra.*

On the other side of the transaction, international financial institutions make interbank placements in the Eurodollar market when they determine that the investment meets their overall needs with respect to the amount of funds being placed, the date of repayment, and the profit opportunity from the placement, taking into account the political and economic risks of depositing in the foreign country.[4]

The Philippine Government's Intervention

If the two interbank placements made by WFAL/Singapore with Citibank/Manila had continued to follow the normal pattern in the Eurodollar market, when they came due for repayment in December 1983 Citibank/Manila would have collected the necessary dollars for repayment from its various investments in the Philippines and elsewhere, and these Eurodollars would have retraced the route through New York to WFAL/Singapore. The routing instructions could have been changed by WFAL/Singapore at any time up to repayment but, whatever the funds' ultimate destination, the route customarily would have passed through bank accounts in New York.

Before the December 1983 repayment dates, however, the political and financial situation in the Philippines deteriorated and, in the fall of 1983, the Philippine government took steps to avoid an economic collapse. The Philippine government included in these actions a regulation directing that all banks surrender their foreign exchange (*i.e.*, their non-Philippine currency), wherever

[4] *See, e.g.*, Testimony of Dr. Gunter Dufey, Tr. 703-05; Testimony of Dr. Ian Giddy, Tr. 1027-29, 1032-33, 1101-03.

situated, to the Philippine central bank (Circular No. 970) and issued an order ("MAAB 47") (App. K) preventing repayment by Philippine banks, such as Citibank/Manila, of the principal amount of U.S. dollar obligations owed to non-Philippine entities, such as WFAL/Singapore. App. at 4a.

Citibank/Manila subsequently requested relief from these regulations, and the Philippine government permitted Citibank/Manila to make a partial payment to over 400 depositors, including WFAL/Singapore. The balance of some $1.2 million owed to WFAL/Singapore remains on deposit with Citibank/Manila, along with over $300 million owed to other depositors similarly situated. For the entire period that these deposits have been frozen, the Philippine government has permitted Citibank/Manila to make dollar interest payments to each depositor—including WFAL/Singapore—and these interest payments have been made.

With respect to the unpaid principal amount, WFAL/Singapore demanded that Citibank in New York pay the $1.2 million in the blocked Citibank/Manila account. Citibank explained that it was not liable for this amount because WFAL/Singapore had chosen to place its deposit in the Philippines and therefore had borne the risk that Philippine government actions might prevent Citibank/Manila from repaying the deposits.

The Decisions Below

In 1984, WFAL/Singapore brought this action against Citibank in the United States District Court for the Southern District of New York to recover the remaining principal of its Philippine placements. WFAL/Singapore asserted federal question jurisdiction under 12 U.S.C. § 632 (1982) and diversity jurisdiction under 28 U.S.C. § 1332(a) (1982).

Following the district court's denial of WFAL/Singapore's motion for summary judgment (App. F), the case proceeded to trial before the court in December 1986. Because of the importance of the issue for the federal banking system, three parties—including the Federal Reserve Bank of New York and two industry groups representing a total of some 240 banks—submitted briefs as *amici curiae* in support of Citibank's position.

On May 28, 1987, the district court issued an opinion and judgment in favor of WFAL/Singapore. App. E. It ruled that "under Philippine law Citibank's worldwide assets are available for satisfaction of plaintiff's claim" and that nothing in the Philippine government's orders prevented Citibank from using assets not belonging to Citibank/Manila to repay WFAL/Singapore's deposits. App. at 35a.

On appeal from the district court's ruling, Citibank argued that MAAB 47 precluded recovery by WFAL/Singapore and that, in any event, U.S. banking law and policy required that it not be held liable for foreign branch deposits where the foreign government prevented the branch from using its own assets to repay the deposits. *Amicus* briefs were filed in support of Citibank's position, including a brief of the United States government on behalf of the Department of State, the Department of the Treasury, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board. The government stated that it "has a strong policy that, in the absence of an agreement to the contrary, a U.S. bank should not bear the risk that a foreign government will impose restrictions on the deposits of its foreign branches." Brief for the United States as Amicus Curiae at 15, *Wells Fargo*, *supra*. The government argued that if Philippine law required U.S. banks to bear such risks (as the district court had held) it should not be given effect in U.S. courts. *Id.* at 22.

The United States Court of Appeals for the Second Circuit initially remanded the case to the district court

with directions that the district court clarify its ruling and, in particular, determine whether the parties had agreed on the place where repayment of the deposits was to occur. App. D.

On remand, the district court made supplemental findings of fact and conclusions of law. App. C. The court determined that the wire routing instructions in the telex confirmations provided for repayments to occur in New York. The court further found that these instructions referred only "to the location where the wire transfers effectuating repayment at maturity were to occur" and did not constitute agreement on "the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers." App. at 14a. The court went on to explain that the real dispute in the case was over "which assets Citibank is required to use in order to satisfy its obligation to plaintiff." *Id.* at 19a. It concluded that under New York law Citibank's worldwide assets were available to satisfy the ultimate liability for the Philippine branch's obligations (*id.* at 24a), and that MAAB 47 did not justify Citibank's refusal to use assets other than those belonging to its Manila branch to repay the Philippine deposits. *Id.* at 22a-23a.

The court of appeals affirmed the district court's judgment, but on fundamentally different grounds. App. A. The court stated that "a debt on a deposit normally authorizes a demand for the money only at the relevant branch," but that this general rule is "subject to variation by agreement of the parties." *Id.* at 6a. Contrary to the district court's finding of fact that the parties had not agreed as to where or out of what assets the debt could be collected, the court of appeals held as a matter of law that "[i]f the parties agree that repayment of a deposit in a foreign bank or branch may occur at another location, they authorize demand and collection at that other location." *Id.* Because the wire routing instruc-

tions for repayment referred to a transfer of funds between accounts in New York, and because there was "no separate agreement restricting where the deposits could be collected," the court concluded that WFAL/Singapore was therefore "entitled to collect the deposits out of Citibank assets in New York." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

The issue in this case is closely related to that presented in *Citibank, N.A. v. Trinh, petition for cert. pending*, No. 88-1031 (U.S. filed Dec. 20, 1988). In *Trinh*, we submit that absent an express agreement to the contrary, U.S. banks should not be held liable for deposits placed with their foreign branches when foreign governments prevent the branches themselves from repaying.[5] Although in this case the court of appeals purported to recognize this general principle, it then promptly proceeded to construe the exception in a way that swallows the rule: it constructed an "agreement to the contrary" from the routing instructions for payment that, as federal banking regulators have understood and the district court expressly found, do *not* constitute an agreement by U.S. banks to commit their worldwide assets to protect foreign branch depositors against foreign governmental interference.

This Court's review is essential here because of the severe consequences of the ruling below. The standard instructions for Eurodollar interbank placements and repayments route transfers between accounts in New York. The result of the court of appeals' ruling is thus that all such obligations are now payable and collectible against assets in the United States. Where the party receiving the placement is the foreign branch of a U.S.

[5] Neither *Trinh* nor this case involves the question whether a U.S. bank is responsible for the deposit obligations of its foreign branches in the absence of sovereign interference with branch operations. U.S. banks do bear such responsibility. App. at 31a, 43a.

bank, the foreign depositor can now look to the worldwide assets of the U.S. bank for repayment whenever a foreign government has prevented the branch from repaying out of its own assets.

The instant case, like *Trinh*, concerns whether a U.S. bank or a depositor in the bank's foreign branch should bear the risk that a foreign government will prevent the branch from using its own assets to meet its deposit obligations as they come due. The United States appeared as *amicus* below both in this case and in *Trinh*, urging as a matter of federal policy and economic analysis that such risk should be allocated to the depositor unless the U.S. bank has clearly agreed to assume it. Both courts of appeals, however, reached results that do violence to the policies that the government sought to protect. The Court should grant certiorari in *Trinh* and in the present case to assure that federal and state courts follow the rule of risk allocation reflected in federal banking regulation and advocated by the government as *amicus* in these two cases below.

I. Contrary to the Court of Appeals' Decision, Federal Banking Law and Policy Require that, Absent an Express Agreement, a U.S. Bank Should Not Be Held To Guarantee Against the Risk of Foreign Sovereign Action that Prevents Its Foreign Branch From Repaying Deposits.

As our petition in *Trinh* demonstrates, federal banking law and policy require that a U.S. bank not be liable, unless it has expressly agreed otherwise, for deposits placed with its branch in a foreign country when the foreign government prevents the branch from using its own assets to repay those deposits. The United States, in its *amicus* brief below (filed on behalf of the Departments of State and Treasury, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency), urged this standard (U.S. Am. Br. at 19-20):

> [I]n the absence of an agreement to pay the depositor at an office other than the branch where his account is maintained, the head office does not guarantee against the risk of sovereign action . . . .
>
> . . . [A contrary rule would] contravene[] U.S. banking policies, which clearly presume that, unless agreed otherwise by the parties, depositors bear the sovereign risk . . . [, and] would ignore longstanding Congressional, Federal Reserve Board and FDIC understanding with respect to the operation of foreign deposits . . . .

This rule is especially appropriate in cases like this one. As the United States noted in its *amicus* brief in the court of appeals (at 18):

> [D]epositors [in the interbank market] are sophisticated and have the ability to choose between banks located in numerous countries. Presumably, the depositor selected a foreign branch in the first place because of the higher interest rate offered offshore; in this regard, the depositor perceives the lack of federal regulation as a benefit to be sought, rather than a cost to be borne or a risk to be avoided.

In these circumstances, "[t]he depositor is in a superior position to avoid unacceptable sovereign risks (to him) either by going to another bank, banking in another country, or contracting with the bank to guarantee the deposit at the head office." *Id.*

In contrast to the Sixth Circuit in *Trinh*, the Second Circuit in the present case accepted the substantive rule articulated by the U.S. government. Relying on "general banking law principles," the court stated that, "subject to variation by agreement of the parties," "'[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried'" and therefore "a debt on a deposit normally authorizes a demand for the money *only* at the relevant branch." App. at 6a (emphasis added).

Nevertheless, the court of appeals held that Citibank must use its worldwide assets to repay Philippine deposit obligations owed by its Manila branch to depositors such as WFAL/Singapore. The court reached this result by invoking the exception for agreements that shift foreign sovereign risk from the depositor to the U.S. bank, holding as a matter of law that such an agreement was implicit in routing instructions for effectuating wire transfers of funds. Because such instructions are standard for most Eurodollar deposits, the decision below transforms the exception for voluntary agreements into a general principle of law that the U.S. bank is *always* liable—a principle that is exactly the opposite of the one that the United States urged was required by federal law and policy.

Just as federal law must be the basis for the general rule governing U.S. bank liability for foreign branch deposits, so too must any exception to the rule be fashioned as a matter of federal law.[6] The efficient working of our national banking system and of the international Eurodollar market, as well as the need for federal regulators to be able to carry out their duties, requires a clear and administrable standard as to when the parties by voluntary agreement have shifted the risk of foreign sovereign action from the foreign depositor to the U.S. bank. If the U.S. bank agrees to pay branch obligations

[6] *See Trinh* Pet. for Cert., *supra*, at 12-18. A rule of federal law is necessary to protect "'uniquely federal interests'" (*Boyle v. United Technologies Corp.*, 108 S.Ct. 2510, 2514 (1988)) in the area of international banking; the court of appeals' decision engenders a "'significant conflict'" (*id.* at 2515) with the federal policies described above that have long been recognized by Congress and bank regulators. In addition, "the federal interest requires a uniform rule" (*id.* at 2516); the liabilities of national banks engaged in worldwide transactions, and the responsibilities of federal regulators in superintending the banking system, cannot be made to depend upon the variations and uncertainties in the laws of 50 states and many foreign countries.

out of its worldwide assets, the consequence is that it "will be subject to reserve and FDIC requirements and, in all likelihood, will compensate for the additional risk by reducing the rate . . . offered on the deposit at the foreign branch."[7]

For this reason, federal law requires that any agreement reallocating risk of foreign sovereign interference to U.S. banks must clearly apprise bank regulators of the nature of the bank's undertaking and thus of the federal requirements applicable to the transaction. The federal government made this essential point to the court below, stating the controlling standard to be that the foreign depositor rather than the U.S. bank is liable for foreign sovereign risk "when that risk was not *specifically assumed* through a head office *guarantee* or an *express contractual commitment*." Letter from the United States as Amicus Curiae to the Court of Appeals for the Second Circuit (June 14, 1988), at 2 (emphasis added). *See also* U.S. Am. Br. at 22 ("as a matter of U.S. law and policy, a depositor making a deposit at a foreign branch—and in the absence of an *explicit guarantee* by the head office—must assume the sovereign risk that the foreign country will restrict repayment") (emphasis added). The same requirement is set forth in federal regulations. *See* 35 Fed. Reg. 2768 (1970) ("[w]hen payment of a deposit in a foreign branch is *guaranteed* by a promise of payment at a banking office in the United States if not paid at the foreign office, the depositor no longer assumes such [foreign sovereign] risk") (App. at 62a) (emphasis added).

The decision of the court of appeals is irreconcilable with this rule of federal law. The court of appeals did

[7] U.S. Am. Br. at 18 n.18. For a more detailed discussion of the distinctions drawn by federal law between foreign and domestic deposit obligations of U.S. banks and of the significance of these distinctions for the U.S. bank regulatory system, *see Trinh* Pet. for Cert., *supra*, at 7-12.

not purport to find a guarantee or other "express contractual commitment" by Citibank to repay WFAL/Singapore's deposit out of Citibank's worldwide assets. Instead, it ordered such repayment based entirely on boilerplate routing instructions for the wire transfer of funds upon the maturity of the Eurodollar deposit with the foreign branch.

Until the decision in this case, it had never been thought that the routine instruction to transfer funds between accounts in New York could constitute an agreement that the U.S. bank would assume the risk of foreign government interference. Certainly federal regulators have never regarded such instructions as being sufficient to shift the risk of foreign sovereign interference to U.S. banks, as the Federal Reserve Bank of New York stated in its Memorandum of Law as Amicus Curiae in the district court (at 12-13) (citation omitted) (emphasis added):

> The location where the depositor has legal right to demand payment is a distinct concept from the location where the deposit is settled. *The fact that settlement of United States dollar deposit liabilities takes place in the United States between United States domiciliaries is not determinative of where the deposit is legally payable.* Virtually all United States large-dollar transactions between parties outside the United States must be settled in the United States. . . . If that fact [of settlement in the United States] were relevant to where a deposit is legally payable, the exemption [from reserve requirements] in Regulation D would almost never apply to foreign-branch deposits denominated in United States dollars. Clearly, the exemption . . . is available to foreign branches of United States banks that book deposits denominated in United States dollars.

In addition, the district court in this case found as a fact that the routing instructions given by WFAL/Singapore to Citibank/Manila were *not* a commitment—

let alone an "express contractual commitment"—that Citibank would guarantee to use its worldwide assets to repay WFAL/Singapore. The district court correctly understood that there is a critical distinction between routing instructions on where to send money when it is withdrawn from a Eurodollar account and the substantive issue of which assets of the U.S. bank can be reached to collect on the debt if the branch holding the deposit is prevented by the foreign sovereign from repaying the deposit when due. As the court explained (App. at 14a):

> [R]epayment and collection describe two distinct concepts. Repayment refers to the location where the wire transfers effectuating repayment at maturity were to occur. Collection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment.

Based on this understanding, the district court specifically found that the parties, while agreeing that repayment was to be made by wire transfer between their accounts in New York, had not "come to an agreement" on "where the deposits could be collected" or "which assets Citibank [could be] required to use" to repay respondent for its Manila deposits. *Id.* at 17a, 19a.

The market itself has also understood until now that Eurodollar deposits remain outside the ambit of U.S. law and regulation despite routing instructions for wire transfers between New York accounts. It is for this reason that Eurodollar deposits generally bear higher interest rates than do U.S. domestic deposits.[8] Indeed, these routing instructions are not even part of the contract between the parties and can be unilaterally changed

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[8] *See infra* at 17 n.9.

by the depositor up to the moment that the repayment takes place.

The court of appeals has manifestly erred, as a matter of federal law, by imposing the risk of foreign government interference on Citibank in the absence of its guarantee or other "express contractual commitment" to repay the Manila branch's obligations. The court's ruling effectively converts foreign Eurodollar deposits into domestic U.S. deposits, exposing U.S. banks and the U.S. banking system to substantial unanticipated risks from foreign sovereign actions of various sorts—whether exchange controls, as in this case, or expropriation, as in *Trinh.* What is more, the court of appeals has left federal regulators entirely at sea as to when U.S. banks will be found to have assumed such risks voluntarily. This Court should grant certiorari to provide necessary clarification on this important and now confused issue.

II. The Court of Appeals' Decision Imposes Grave Risks on U.S. Banks that Obtain Funds in the Eurodollar Interbank Placement Market.

The court of appeals' erroneous decision in this case will cause severe harm to U.S. banks whose foreign operations accept Eurodollar interbank placements. By ruling that all interbank placements effectuated by transfers between accounts in the United States are *ipso facto* payable in the United States, the court of appeals has exposed U.S. banks' assets to liability for Eurodollar deposits with their foreign branches whenever foreign governments prevent the branches themselves from repaying out of their own assets. Moreover, because the court of appeals' decision is based on nothing more than standard routing instructions for repayment of Eurodollar interbank placements, its potential reach goes beyond foreign branches of U.S. banks and would appear to apply to foreign subsidiaries of U.S. banks as well.

The potential risk to U.S. banks from the court of appeals' decision is great. Eurodollar transactions are of critical importance to the efficient operation of international capital markets, because they enable financial institutions to move large amounts of funds around the world and create an alternative to the interest rates and regulatory structure of the U.S. domestic system.[9] As a result, the Eurodollar market has grown to enormous proportions: New York banks daily transfer some $400 billion of Eurodollar transactions, while the foreign branches of U.S. banks alone owe over $40 billion in Eurodollar interbank placements.

The court of appeals' decision will place foreign branches and subsidiaries of U.S. banks at substantial competitive disadvantages in seeking funds for their operations. Foreign branches and subsidiaries of U.S. banks may continue to use the interbank placement market, but they will face increased costs or risks that will impair their ability to offer competitive rates. In the alternative, they may be compelled to seek funding elsewhere. The effect is particularly severe since Eurodollar interbank placements account for roughly 20% of total deposit funding of foreign branches, and presumably an even greater percentage of the short-term deposits necessary to maintain daily funds on hand.

These consequences of the court of appeals' decision strike at the heart of longstanding federal policies. As described in our petition in *Trinh* (at 7), Congress and

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[9] Thus, for example, interest rates in the Eurodollar market are generally higher than those available in the domestic U.S. market, at least in part because of the absence of the costs that are attributable to various U.S. regulations and safeguards applicable to domestic deposits. *See, e.g.*, Brief of the New York Clearing House Association as Amicus Curiae at 4-5, *Wells Fargo, supra*; Testimony of Dr. Gunter Dufey, Tr. 561-62, 703-05, 729-31; Testimony of Dr. Ian Giddy, Tr. 1027-29; 1032-33, 1101-03; Testimony of Mr. Rodney B. Wagner, Tr. 1087.

the Federal Reserve Board have encouraged U.S. banks to operate in foreign markets through foreign branches. The presence of U.S. banks abroad is important to our country's role as a world financial power as well as to U.S. investment and business development overseas and to international trade.[10] The deterrent to foreign branch operations of decisions such as that in the present case contradicts basic federal law and policy favoring such operations, a point expressly noted by the U.S. government in this case:

> [T]he United States is concerned, particularly in the context of the nondocumentary interbank market, that [holding a U.S. bank liable to repay depositors at a foreign branch from the bank's worldwide assets] could lead a prudent U.S. bank to consider curtailing its foreign branch operations, in order to reduce its exposure to losses from governmental freezes on assets. This result, in turn, could limit the sources of financing available to U.S. businesses operating abroad and could ultimately hamper the ability of U.S. companies to compete effectively in worldwide markets.[11]

In *Trinh*, the Sixth Circuit suggested that the problems caused by its decision could be resolved by private contract. Our petition in that case demonstrated the futility of that suggestion, including the utter confusion created by the lower courts over what contractual language would ensure that risk of foreign sovereign interference remained with the foreign depositors.[12] It is even

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[10] Federal Reserve Act, ch. 6, § 25, 38 Stat. 251, 273 (1913); H.R. Rep. No. 69, 63d Cong., 1st Sess. (1913) at 17, 30, 73; S. Rep. No. 133, 63d Cong., 1st Sess., pt. 2 (1913) at 28; 50 Cong. Rec. 4676 (1913).

[11] Brief for the United States as Amicus Curiae at 2-3, *Wells Fargo*, *supra*.

[12] *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir.), *petition for cert. pending*, No. 88-1031 (U.S. filed Dec. 20, 1988) (imputing

clearer in this case that a contractual approach provides no solution. As the record and lower court findings in this case establish (*see supra* at 4 n.2) interbank placements are made in an oral, fast-moving market with minimal documentation. This market does not permit the negotiation of detailed contract terms dealing with matters such as *force majeure* and sovereign risk. Furthermore, because of the large number of banks receiving placements, for one bank or a group of banks to try to impose such provisions on interbank placement transactions would immediately result in a substantial competitive disadvantage, as the United States recognized in its *amicus* brief below (at 20 n.20):

> To require U.S. banks to document completely these transactions would have the potential effect of either removing U.S. banks from the interbank market entirely or imposing transactional costs upon U.S. banks which are not borne by their foreign competitors. Either result diminishes the competitiveness of U.S. banks in the international financial services market.

Thus, U.S. banks cannot avoid liability for Eurodollar deposits with their foreign branches in the future simply by entering into written contracts that allocate the risk of foreign sovereign interference.

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liability of branch to U.S. bank because branch closed on eve of invasion); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982) (imputing liability of branch to U.S. bank because branch not separate corporate entity); *Trujillo-M v. Bank of Nova Scotia*, 51 Misc. 2d 689, 273 N.Y.S.2d 700 (Sup. Ct. 1966), *aff'd without opinion*, 29 A.D.2d 847, 289 N.Y.S.2d 389, *cert. denied*, 393 U.S. 982 (1968) (refusing to impute liability of branch to U.S. bank based on act of state doctrine); *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (Sup. Ct. 1935) (refusing to impute liability of branch to U.S. bank); *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), *on remand*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd without opinion*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928) (same as *Vishipco*).

Beyond its impact on U.S. banks with foreign operations, the decision below also threatens to disrupt the entire Eurodollar interbank placement market by introducing substantial uncertainty about the legal consequences of dollar transfers through New York, which is an established feature of this market. Foreign banks with U.S. branches, dollar accounts, or other assets in the United States must now consider the risk that routine Eurodollar placement transactions will expose their assets here to claims when foreign governments interfere with Eurodollar interbank placements that they accept abroad. Participants in the market may react in various ways, including switching to other currencies for interbank placements, shifting assets or transactions out of New York, or changing interest rates paid in the Eurodollar market. But whatever the ultimate reaction, the market will be disrupted, thereby impairing the national interest in maintaining clear and consistent principles that create stable markets for the conduct of international banking business in the United States.

In sum, the court of appeals in this case has worked a fundamental change in an international banking market of vital importance to U.S. banks and the U.S. banking system, as well as foreign banks, financial institutions, and others around the world. It has done so contrary to federal law. This Court should correct the manifest error below and ensure the continued efficient operation of this international financial market.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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January 25, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 87-7685

WELLS FARGO ASIA LIMITED

versus

CITIBANK, N.A.

Appeal from the United States District Court
for the Southern District of New York

July 18, 1988

Darryl Snider, San Francisco, Cal. (Duncan E. Haynes, Thomas M. Peterson, Jessica M. Hoover, Brobeck, Phleger & Harrison, San Francisco, Cal., Edwin E. McAmis, Skadden, Arps, Slate, Meagher & Flom, New York City, on the brief), for plaintiff-appellee.

John E. Hoffman, Jr., New York City (John J. Roche, Henry Weisburg, Jennifer Freeman, Rachel E. Deming, Melissa A. Samet, David Ledecky, Shearman & Sterling, New York City, Antonio V. Agcaoili, Agcaoili & Associates, Manila, Philippines, on the brief), for defendant-appellant.

John L. Warden, New York City (Michael Straus, Sullivan & Cromwell, New York City, Norman R. Nelson,

Lawrence R. Uhlick, on the brief), for the New York Clearing House Ass'n and the Institute of International Bankers as amici curiae urging reversal.

Richard K. Willard, Asst. Atty. Gen., Washington, D.C. (John R. Bolton, Asst. Atty. Gen., James J. Spears, Deputy Asst. Atty. Gen., Anthony J. Steinmeyer, Jay S. Bybee, Civil Div. of the Dept. of Justice; Abraham D. Sofaer, Legal Advisor, Dept. of State; Mark Sullivan III, General Counsel, D. Edward Wilson, Jr., Acting General Counsel, Dept. of Treasury; Michael Bradfield, General Counsel, Ricki Rhodarmer Tigert, Asst. General Counsel, Board of Governors of the Federal Reserve System; John L. Douglas, General Counsel, Federal Deposit Ins. Corp., Robert B. Serino, Deputy Chief Counsel, Office of the Comptroller of the Currency, all of counsel), filed briefs for the United States as amicus curiae urging reversal.

Before TIMBERS, KEARSE, and MAHONEY, Circuit Judges.

KEARSE, Circuit Judge:

Defendant Citibank, N.A. ("Citibank"), appeals from a final judgment entered in the United States District Court for the Southern District of New York after a bench trial before Whitman Knapp, *Judge*, awarding plaintiff Wells Fargo Asia Limited ("WFAL") $1,066,000 as the balance due on certain time deposits carried by Citibank's branch in Manila, Philippines ("Citibank/Manila"). *See* 660 F. Supp. 946 (1987) ("1987 Opinion"). Citibank contends that judgment should have been entered in its favor because the obligation to repay the deposits was suspended by a decree of the Philippine government. For the reasons below, we affirm the judgment.

BACKGROUND

The pertinent facts, as found by the district court in a Memorandum and Order dated April 22, 1988 ("1988 Opinion"), and a Memorandum and Order published at 612 F. Supp. 351 (1985), and adopted in the 1987 Opinion, 660 F. Supp. at 947, are as follows. On June 10, 1983, WFAL, a Singapore-chartered bank wholly owned by the United States-chartered Wells Fargo Bank, N.A., placed two six-month, nonnegotiable U.S. $1,000,000 deposits with Citibank/Manila. The placements were initially arranged orally by the parties' traders with the assistance of an Asian money broker, Astley & Pearce ("Astley"). Astley's report to the parties stated, *inter alia:*

> Pay: Citibank, N.A. New York Account Manila
>
> Repay: Wells Fargo International, New York Account Wells Fargo Asia Ltd., Singapore Account #003-023645

Astley sent WFAL a telex containing the following "[i]nstructions":

> Settlement—Citibank NA NYC AC Manila
>
> Repayment—Wells Fargo Bk Intl NYC Ac Wells Fargo Asia Ltd Sgp No 003-023645

Thereafter, the parties exchanged written confirmations with respect to each deposit. WFAL's confirmation slips to Citibank stated:

> We shall instruct Wells Fargo Bk Int'l New York our correspondent please pay to our a/c with Wells Fargo Bk Int'l New York to pay to Citibank NA customer's correspondent USD 1,000,000.

The telexes from Citibank/Manila to WFAL stated:

> Please remit US Dlr 1,000,000 to our account with Citibank New York. At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.

The deposits were to mature on December 9 and 10, 1983. On October 15, 1983, the Philippine government

issued a Memorandum to Authorized Agent Banks ("MAAB 47") which provided in part as follows:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank [of the Philippines] thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

As interpreted by the Central Bank of the Philippines, this decree prevented Citibank/Manila, an "authorized agent bank" under Philippine law, from repaying the WFAL deposits with its Philippine assets, *i.e.*, those assets not either deposited in banks elsewhere or invested in non-Philippine enterprises. Citibank/Manila did not repay WFAL's deposits upon maturity.

WFAL commenced the present action on February 10, 1984. Thereafter, Citibank/Manila sought and received from the Central Bank of the Philippines permission to repay its foreign depositors to the extent it could do so with non-Philippine assets. Accordingly, Citibank/Manila paid WFAL $934,000. The remainder of the $2,000,000 deposited, *i.e.*, $1,066,000, remained in dispute.

In its 1987 Opinion, the district court, "accept[ing] plaintiff's invitation to assume that Philippine law governs this action," ruled that "under Philippine law, Citibank's worldwide assets are available for satisfaction of plaintiff's claim." 660 F. Supp. 947, 950. Judgment was entered in favor of WFAL, and this appeal followed.

In an order dated March 25, 1988, this Court made a limited remand to the district court for clarification of the basis of the judgment. We asked the court to make a finding as to, *inter alia*, "[w]hether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in

Manila." Accordingly, in its 1988 Opinion, the district court made supplemental findings of fact and conclusions of law. The court found that the parties "agree[d] that repayment was to occur in New York." *Id.* at 6. Interpreting collectibility to be different from repayability (stating that "[r]epayment refers to the location where the wire transfers effectuating repayment at maturity were to occur," while "[c]ollection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment" (*id.* at 4)), the court concluded that the parties had reached no agreement as to where the debt was collectible. Responding to the other questions posed in our March 25 order, the district court ruled that New York law, rather than Philippine law, governed the dispute; that under New York law, Citibank's worldwide assets were available for satisfaction of WFAL's claim; and that apparently no provision of Philippine law precluded an agreement between the parties to make the deposits collectible outside of Manila. The court thus reaffirmed the judgment in favor of WFAL.

The parties and the United States as amicus curiae have filed supplemental briefs addressing the district court's 1988 Opinion. In light of the district court's supplemental findings of fact and conclusions of law, we affirm the judgment.

DISCUSSION

In general, a creditor may collect or enforce a debt wherever he can obtain jurisdiction over the debtor. *Harris v. Balk*, 198 U.S. 215, 222-23, 225, 25 S.Ct. 625, 626-27, 627, 49 L.Ed. 1023 (1905). "'"All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a de-

mand upon the debtor everywhere." ' ". *Id.* at 225, 25 S.Ct. at 628 (quoting *Chicago, Rock Island & Pacific Ry. v. Sturm*, 174 U.S. 710, 716-17, 19 S.Ct. 797, 800, 43 L.Ed. 1144 (1899) (quoting 2 ***Parsons on Contracts*** 702 (8th ed.))).

A special limitation has traditionally been recognized under general banking law principles. Thus, " '[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried . . . .' " *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862 (2d Cir. 1981) (certificate of deposit) (quoting Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 975 (1979)), *cert. denied*, 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291 (1982); *United States v. Guaranty Trust Co.*, 100 F.2d 369, 371 (2d Cir. 1938) (deposit not evidenced by certificate); *Zimmermann v. Miller*, 2 F.2d 629, 631 (S.D.N.Y. 1924) (same), *rev'd on other grounds*, 7 F.2d 443 (2d Cir. 1925), *aff'd*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1927). The consequence of this limitation is that a debt on a deposit normally authorizes a demand for the money only at the relevant branch.

This normal limitation on the situs of a banking debt is, however, subject to variation by agreement of the parties. If the parties agree that repayment of a deposit in a foreign bank or branch may occur at another location, they authorize demand and collection at that other location. *See Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.) (situs of debt on deposits in Costa Rican banks was New York where deposits were to be repaid New York), *cert. dismissed*, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 650-51 (2d Cir. 1984) (situs of debt, for act-of-state-doctrine purposes, on deposits in Cuban branch was not limited to Cuba where deposits were payable at

other branches around the world); *id.* at 651-52 (Kearse, J., dissenting); *cf. Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (situs of debt was "wholly" within Mexico for act-of-state-doctrine purposes where deposit contracts specified Mexico as place of repayment).

We agree with the district court that an agreement by the parties to make a deposit debt repayable at a place other than the bank branch carrying the deposit appears to be valid under Philippine law as well as United States law. *See* Civil Code of the Philippines art. 1159 ("Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.") Whether or not the parties have entered into such an agreement is a question of fact, and a finding of such an agreement is subject to review under the "clearly erroneous" standard, Fed. R. Civ. P. 52(a). *See Wards Co. v. Stamford Ridgeway Associates*, 761 F.2d 117, 120 (2d Cir. 1985).

In the present case, the district court found that the parties had agreed that repayment was to occur in New York. That finding plainly is not clearly erroneous. The Astley reports stated "Repay: Wells Fargo International, *New York Account* Wells Fargo Asia Ltd., Singapore," and "Repayment—Wells Fargo Bk Intl *NYC Ac* Wells Fargo Asia Ltd Spg . . . ." (Emphasis added.) The written confirmations exchanged by the parties were similar. For example, Citibank/Manila's own telexes to WFAL stated: "At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York." (Emphasis added.) The repeated references to repayments or remittances at maturity to New York accounts amply support the district court's finding that the parties agreed that repayment would be made in New York. Since MAAB 47 has no effect on a bank's obligations to perform acts outside of the Philippines, we conclude that the district court did not err in upholding WFAL's claim.

The district court's view that repayment and collection are divisible concepts does not require a different result. The above authorities suggest that a debt may be collected wherever it is repayable, unless the parties have agreed otherwise. Since the court found here that there was no separate agreement restricting where the deposits could be collected, and we are aware of nothing in the record that contradicts that finding, we conclude that WFAL was entitled to collect the deposits out of Citibank assets in New York.

Finally, we note that the gist of the concerns expressed by the amici is their "policy interest in the principle that, *in the absence of agreement to the contrary*, a U.S. bank should not bear the risk that a foreign government will impose restrictions on the deposits of its foreign branches." (Letter of the United States to this Court, dated June 14, 1988; emphasis added). Our affirmance in the present case is based on the district court's finding of just such an agreement.

CONCLUSION

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 87-7685

WELLS FARGO ASIA LIMITED

v.

CITIBANK, N.A.

Judgment of Appeal from the United States District Court for the Southern District of New York

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July 18, 1988

Before: TIMBERS, KEARSE, and MAHONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is Affirmed in accordance

with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 87-7685

WELLS FARGO ASIA LIMITED

versus

CITIBANK, N.A.

Order Denying Motion of Citibank for Rehearing and Suggestion for Hearing *En Banc* Entered on September 27, 1988

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant, CITIBANK, N.A. and Amicus Curiae NY CLEARING HOUSE & INSTITUTE OF INTERNATIONAL BANKERS.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Fred Cassidy

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84-Civ.-996 (WK)

WELLS FARGO ASIA LIMITED

versus

CITIBANK, N.A.

April 22, 1988

Edwin E. McAmis, Skadden, Arps, Slate, Meagher & Flom, New York City (Mitchell C. Sockett, of counsel), and Darryl Snider, Brobeck, Phleger & Harrison, San Francisco, Cal. (Duncan E. Haynes, Jessica M. Hoover and Susan E. Samuels, of counsel), for plaintiff.

John E. Hoffman, Jr., Shearman & Sterling, New York City (Henry Weisburg, Jennifer Freeman, Robert S. Fischler and Melissa Samet, of counsel), for defendant.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

On March 25, 1988 the Court of Appeals (hereinafter "The Court") remanded this action, finding it unclear

whether our opinion disposing of this case had found that the parties had agreed that the deposits were collectible only at Citibank's Manila branch or whether we had held that Philippine law governed this action. In point of fact, we made no decision on either of these questions although they had been extensively argued. Before attempting to answer them, we shall—by way of background—briefly explain our earlier decision to avoid such determinations.

Ever since this lawsuit began, the parties have vigorously contested the issues underlying both these questions. On plaintiff's motion for summary judgment, it contended that the contract made the deposits payable in New York, and that MAAB 47 did not purport to prohibit repayment of the deposits in New York with Citibank's general assets. Citibank, on the other hand, contended that discovery would reveal an understanding in the banking community that foreign branch deposits are payable only in the country where the branch is located, and subject to the host country's laws. Throughout the trial, Wells Fargo maintained the position that New York law applied, and Citibank continued to insist that the case was governed by the law of the Philippines, including MAAB 47, which was claimed to have excused repayment of plaintiff's deposits.

After the trial had been completed, it turned out—as noted in Citibank's brief to the Court (at 15-16)—that the complete extent of the evidence concerning Philippine law consisted of "two affidavits by Philippine lawyers" totalling "less than fourteen pages." [1] Upon that state of the record, Wells Fargo, while reiterating

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[1] In its brief to the Court (at 16) Citibank observes that "Judge Knapp did not request any further submission or testimony regarding Philippine law." We gather from this statement that Citibank thinks we should have treated it as some sort of *pro se* litigant and taken responsibility for assuring that it had adequately researched the law it had for over two years been urging us to apply.

its earlier positions, also submitted that it would prevail even if we were to assume that Philippine law governed. We accepted this invitation to decide the case under Philippine law, on the further assumption (which seemed to us reasonable) that Citibank had put its best foot forward in presenting its views as to that law.

It turned out, however, that Citibank was by no means so satisfied, and presented the Court with a wealth of material on Philippine law which it had never brought to our attention. Had Citibank made a motion before us to reconsider our decision on the basis of this additional authority, we certainly would have granted such a motion and would then have proceeded to decide all the issues of fact and questions of law which had been presented to us,[2] declining what would then have appeared to be an ill-considered invitation by Wells Fargo. It is on that basis that we shall now answer the specific questions posed by the Court.

(a). *Whether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in Manila.*

At the outset, it appears to us that repayment and collection describe two distinct concepts. Repayment refers to the location where the wire transfers effectuating repayment at maturity were to occur. Collection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment.

[2] Citibank, in its brief to the Court (at 18) and again in its reply brief (at 1-2), states that we had "decided" that Philippine law determines the deposit obligations in this case. As our opinion was intended to make clear, we expressly refrained from making any such decision, but acted on the *assumption* that Philippine law was controlling.

Of course, the contract itself is the first place we must look to determine the parties' agreement.

Neither party disputes the formation of a binding deposit contract, nor is it disputed that the placements were initially arranged orally over the telephone by the parties' traders with the assistance of an Asian money-broker, Astley & Pearce. No evidence was introduced as to what the traders said, or even whether they spoke to each other directly or conducted their negotiations entirely through the broker. The only clue we have on this subject is the report prepared by the broker for the parties. The document sent by Astley & Pearce, states (Pl. Ex. 10):[3]

> Borrower: Citibank, N.A. Manila
> Lender: Wells Fargo Asia Ltd., Singapore
> We hereby confirm having negotiated the following deposit/placement on your behalf:
> Amount: US$1,000,000.00
> Rate: 10%
> Term: 178 das.
> From: 14-06-83 To: 09-12-83
>
> * * * *
>
> Pay: Citibank, N.A. New York Account Manila
>
> Repay: Wells Fargo International, New York
> Account Wells Fargo Asia Ltd., Singapore
> Account #003-023645.

A telex sent by Astley & Pearce to Wells Fargo (Pl. Ex. 12) similarly states:

> We confirm having the following for your account and risk—
> Principal: US 1,000,000
> Rate: 10

[3] Pl. Ex. 11, reflecting the second deposit, is identical in all respects except that the term is 181 days, and the maturity date is accordingly 12-12-83.

From: 14/06/83 To: 9/12/83
14/06/83 12/12/83
Instructions:
Settlement—Citibank NA NYC Ac Manila
Repayment—Wells Fargo Bk Intl NYC
Ac Wells Fargo Asia Ltd Sgp No 003-023645

Subsequently, Wells Fargo and Citibank exchanged written confirmations (Pl. Ex. 4-9). Wells Fargo's confirmation slips state (Pl. Ex. 8, 9):

> We shall instruct Wells Fargo Bk Int'l New York our correspondent pleas to pay to our a/c with Wells Fargo Bk Int'l New York to pay to Citibank NA customer's correspondent USD 1,000,000.

The telexes from Citibank's Manila office to Wells Fargo in Singapore state (Pl. Ex. 4-7):

> Please remit US Dlr 1,000,000 to our account with Citibank New York. At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.

These various confirmations reflect that the interbank placements were accomplished through a series of wire transfers by the parties' correspondent banks in New York, and that, at maturity, the deposits were to be repaid by Citibank, N.A. (Citibank's New York correspondent bank) to Wells Fargo Bank International (Wells Fargo's New York correspondent bank) for the account of Wells Fargo's Singapore office. Thus, the confirmations established an agreement that repayment was to occur in New York.

As to the second component of the Court's question, whether the parties agreed that the deposits were collectible only in Manila, the confirmation slips are silent. At trial, both sides offered evidence aimed at establishing that an agreement concerning the place of collection could be implied from custom and usage in the international

banking field. This evidence consisted of testimony from various bankers about their interbank placement practices and their understanding of sovereign risk. In addition, each party's expert testified on these topics. In particular, each expert analyzed the relevant interest rates which were claimed to support his own opinion or defeat the view of the opposing party's expert. Citibank, for example, sought to demonstrate an understanding that the depositor could collect only in the country where the deposit was placed, i.e., the Philippines, on the theory that "sovereign risk" accounted for the fact that interest rates in Manila were higher than those in New York. Wells Fargo, on the other hand, introduced evidence aimed at showing an understanding within the Eurodollar market that the depositor could look to the head office for repayment. Wells Fargo's witnesses stressed the identity of the interest rates in Manila and in concededly less risky locations such as London.[4] In our prior opinion (J.A. 596; 660 F. Supp. at 950) we observed that neither party succeeded in establishing any universal understanding amounting to custom or practice within the banking community which would imply a collection term into the contract. We believe that observation to have been correct, and now so find.

In summary, since the deposit contracts do *not* reflect any agreement on the issue of where the deposits could be collected, and since no term can be implied based on custom or usage in the Eurodollar market, we find that the parties failed to come to an agreement on this question.

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[4] There was dispute between the parties as to whether or not Eurodollar deposits earned the same interest if made in secure localities such as London or presumably riskier places such as Manila. We previously found that Citibank's Eurodollar interest rate was identical in all localities (J.A. 597; 660 F. Supp. at 950).

(b) *If there was an agreement, what were its essential terms?*

The only agreement relating to collection or repayment was that repayment would occur in New York.

(c) *Whether Philippine law (other than MAAB 47) precludes or negates an agreement between the parties to have the deposits collectible outside Manila?*

We know of no such provision of Philippine law.

(d) *If there is no controlling Philippine law referred to in (c) above, what law does control?*

Much of the confusion which has transformed this case from a simple breach of contract action into one which—it is claimed—threatens the foundations of the international monetary system stems, in our view, from the fact that the parties have never been able to agree as to exactly what they are fighting about. In Citibank's view, the real dispute in this case is whether MAAB 47 provided a legally valid reason for Citibank to avoid payment of plaintiff's deposits, which are conceded to be due. Citibank argued as follows: the deposits are payable only in Manila subject to Philippine law; MAAB 47 prevents repayment in Manila; therefore, Citibank has a legally recognized reason to avoid payment. Wells Fargo, however, never seriously contested the proposition that MAAB 47 prevented Citibank from using the assets booked at its Manila branch toward repayment of plaintiff's deposits.[5] Rather, the portion of Citibank's syllogism that Wells Fargo challenges is the contention that Citibank's obligation to satisfy the deposits is limited to the assets booked at Citibank's Manila branch.

[5] In our previous order, we found that MAAB 47 prevented the the use of assets booked at Citibank's Manila branch (both Philippine and non-Philippine assets), but that it did not prohibit use of assets carried on the books of any other Citibank branch (J.A. 590-591; 660 F. Supp. at 948).

Wells Fargo contends that under New York law, which it claims governs this action, it is entitled to look to all of Citibank's assets for repayment, even if MAAB 47 disabled the Manila branch from using its own assets to meet the deposit obligations. Hence, the dispute in this case—to which most of the trial was devoted in the guise of discussing "sovereign risk"—boils down to one question: is Citibank obligated to use its worldwide assets to satisfy plaintiff's deposits? In other words, the dispute is not so much about where repayment physically was to be made or where the deposits were collectible,[6] but rather which assets Citibank is required to use in order to satisfy its obligation to plaintiff. As we have previously found that the contract was silent on this issue, we interpret query (d) as imposing upon us the task (which so far we have been able to avoid) of deciding whether New York or Philippine law controls the answer to that question.

The legal principles governing our determination are straightforward. Jurisdiction in this action is asserted both on the basis of diversity and federal question involving 12 U.S.C. § 632. In diversity cases, of course, we must apply the conflict of law doctrine of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 U.S. 487. In federal question cases, we are directed to

[6] Unlike many of the cases cited to us by Citibank, *e.g.*, *Perez v. Chase Manhattan Bank, N.A.* (1984) 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5; *Braka v. Bancomer* (2d Cir. 1985) 762 F.2d 222; *Garcia v. Chase Manhattan Bank, N.A.* (2d Cir. 1984) 735 F.2d 645; *Vishipco Line v. Chase Manhattan Bank, N.A.* (2d Cir. 1981) 660 F.2d 854; *Callejo v. Bancomer* (5th Cir. 1985) 764 F.2d 1101; this case does not involve certificates of deposit or similar tangible documents that must be presented at a particular branch in order to secure repayment. On the contrary, Citibank's obligation to remit the funds to Wells Fargo was triggered by the passage of time, and Wells Fargo was not required to make a "demand" or take any other action in Manila or anywhere else.

apply a federal common law choice of law rule to determine which jurisdiction's substantive law should apply. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.* (2d Cir. 1980) 629 F.2d 786, 794-95, *cert. denied* (1981) 449 U.S. 1080. The rule in New York is that "the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." *Intercontinental Planning, Ltd. v. Daystrom, Inc.* (1969) 24 N.Y.2d 372, 382, 300 N.Y.S. 2d 817, 825. Federal law invokes similar considerations, *see Corporacion Venezolana,* 629 F.2d at 795, and the place of performance is considered an important factor. *Citibank, N.A. v. Benkoczy* (S.D. Fla. 1983) 561 F. Supp. 184, 186 and cases cited therein.

Regardless of whether the New York or federal test is used, application of these standards leads us to the conclusion that New York law should be used to evaluate Wells Fargo's contention that Citibank's worldwide assets are available for repayment of the deposits. As the New York Court of Appeals has recognized, "New York . . . is a financial capital of the world, serving as an international clearing house and market place for a plethora of international transactions . . . In order to maintain its preeminent financial position, it is important that the justified expectations of the parties to the contract be protected." *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.* (1975) 37 N.Y.2d 220, 227, 371 N.Y.S.2d 892, 898. In our view, these expectations will be best promoted by applying a uniform rule of New York law where, as here, the transactions were denominated in United States dollars and settled through the parties' New York correspondent banks, and where the defendant is a United States bank with headquarters in New York. Since Eurodollar transactions denominated in U.S. dollars customarily are cleared in New York (Howard

Tr. 450), the rationale for application of New York law becomes even stronger. If the goal is to promote certainty in international financial markets, it makes sense to apply New York law uniformly, rather than conditioning the deposit obligations on the vagaries of local law, and requiring each player in the Eurodollar market to investigate the law of numerous foreign countries in order to ascertain which would limit repayment of deposits to the foreign branch's own assets.

As to what New York's law is on this question, the answer is not entirely clear. In at least one older case, the Second Circuit, interpreting New York law, concluded that there was no obligation due at the main branch to a depositor in another branch. *United States v. First National City Bank* (2d Cir. 1963) 321 F.2d 14, *aff'd on rehearing en banc* (2d Cir. 1964) 325 F.2d 1020, *rev'd on other grounds* (1965) 379 U.S. 378. However, the most recent pronouncement on this subject by New York's highest court, which we believe binds us, holds that the parent bank is ultimately liable for the obligations of the foreign branch. *Perez v. Chase Manhattan National Bank, N.A.* (1984) 61 N.Y.2d 460, 468, 474 N.Y.S. 2d 689, 691, *citing, Sokoloff v. National City Bank of N.Y.* (Sup. Ct. N.Y. Cty. 1927) 130 Misc.2d 66, 73, 224 N.Y.S. 102, 114, *aff'd* 223 App. Div. 754, 227 N.Y.S. 907, *aff'd* 250 N.Y.69, 164 N.E. 745. *Accord, Vishipco Line v. Chase Manhattan Bank, N.A.* (2d Cir. 1981) 660 F.2d 854, 863.

Notwithstanding this general rule, there are circumstances in which we believe a New York court would defer to local law. For example, if the Philippines had confiscated plaintiff's deposits, New York courts would interpret the expropriation as a compulsory assignment of the depositor's rights, so that payment to the Philippine assignee would discharge the debt. A New York court would further recognize such compulsory assignment as an act of a foreign sovereign unreviewable

under the Act of State doctrine. *Perez, supra,* 61 N.Y.2d 460. We believe New York would take a similar approach in the situation where a foreign government had effected a partial confiscation in the form of a tax on a deposit made at a foreign branch. *See, Dunn v. Bank of Nova Scotia* (5th Cir. 1967) 374 F.2d 876. However, we are aware of no persuasive authority to tell us to what extent, if any, a New York court would defer to local law in the situation here presented, where the foreign sovereign did not extinguish the branch's debt either in whole or in part but merely conditioned repayment on the obtaining of approval from a government agency. Fortunately, we need not resolve that troublesome question. It is not presented by the record before us.

Citibank's answer in this action attempts to raise a circumstance requiring deference to local law by asserting, as an affirmative defense, that "MAAB No. 47 excuses Citibank's performance of the deposit arrangements." (Answer ¶ 25). Throughout this litigation, we and the parties have treated this allegation as raising an impossibility defense. Of course, the Decree itself must provide the parameters for evaluating such a defense. MAAB 47 provides, in pertinent part:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru [sic] the Management of External Debt and Investment Accounts Department (MEDIAD) *for prior approval.*
>
> Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours in New York City on October 14, 1983, shall not be reduced *without prior Central Bank approval.* (Emphasis supplied)

Thus, the Decree specifically contemplates that obligations to foreign banks may be repaid as long as prior Central Bank approval is obtained.

With respect to Citibank's efforts to comply with the Decree, we refer back to the three types of assets which we discussed in our prior opinion. In the case of assets carried on the books of Citibank's Manila branch, those which are invested with entities situated in the Philippines are considered Philippine (or local) assets, while those deposited in banks located outside the Philippines or invested in non-Philippine enterprises are called non-Philippine assets. It is not disputed that Citibank sought but did not obtain approval for its Manila branch to use its Philippine (or local) assets toward repayment of the Deposits. It is further undisputed that Citibank applied for and did receive Central Bank permission for its Manila branch to repay foreign depositors to the extent of the non-Philippine assets carried on the books of that branch. This approval resulted in the partial repayment of $934,000. However, no permission was ever sought to use the third category of assets here at issue, namely, assets booked at Citibank's offices outside the Philippines. Hence, assuming without deciding that MAAB 47 required Citibank to secure permission in order to use its worldwide assets, we have no way of knowing whether or not approval would have been granted. We can, however, say with certainty that, having failed to request approval, Citibank's impossibility defense must fail. When the "government or other restraint does not render performance absolutely impossible, it is the duty of the promisor to make a bona fide effort to dissolve and be relieved of the restraint which operates to prevent his performance." *Brown v. J.P. Morgan* (Sup. Ct. N.Y. Cty. 1941) 177 Misc.626, 31 N.Y.S.2d 323, 334, *rev'd on other grounds* (1st Dep't 1943) 265 App.Div. 631, 40 N.Y.S.2d 229, *aff'd* (1946) 295 N.Y. 867. In our earlier order, we made a finding that Citibank had not

satisfied its good faith obligation to seek the government's consent to use the assets booked at Citibank's non-Philippine offices (J.A. 598, 660 F. Supp. at 950-951), and we hereby reaffirm that finding.

In summary, we conclude that under New York law, which governs this question, Citibank is liable for the debt of its Manila branch and plaintiff is entitled to look to Citibank's worldwide assets for satisfaction of its deposits. We do not express any view as to what the New York courts would have done in the event that Citibank had requested authorization to use such assets, and approval had been denied. That situation is not presented on this record.

We therefore conclude that no amended judgment is appropriate and reaffirm the one previously entered.

The foregoing shall constitute our supplemental finding of fact and conclusions of law. The Clerk is directed forthwith to certify this Memorandum and Order to the Court of Appeals.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 87-7685

WELLS FARGO ASIA LIMITED

versus

CITIBANK, N.A.

Order Directing Limited Remand
Entered on March 25, 1988

Before: TIMBERS, KEARSE, and MAHONEY, Circuit Judges.

Appellant Citibank, N.A. ("Citibank") appeals from a judgment entered July 6, 1987 in the United States District Court for the Southern District of New York, Whitman Knapp, *District Judge*. The court held Citibank liable to pay on two certificates of deposit made by Wells Fargo Asia Limited ("WFAL") at Citibank's Manila, Philippines, branch although that branch was unable to pay with its assets located in the Philippines because of a Philippine sovereign decree (MAAB 47).

The case was argued before us on February 18, 1988 and we reserved decision.

We find it unclear from the district court's Memorandum and Order dated May 28, 1987, whether the court found that the parties agreed that the deposits were collectible only at the Manila branch of Citibank or

elswhere as well. We also find it unclear whether the district court found that Philippine law other than MAAB 47 precludes or negates an agreement between the parties to have the deposits collectible outside of Manila.

Accordingly, to enable this Court to have the foregoing information before we decide the case, it is

ORDERED as follows:

(1) That the case is remanded to the district court for the limited purpose of making supplemental findings of fact and conclusions of law upon the following matters:

(a) Whether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in Manila.

(b) If there was an agreement, what were its essential terms?

(c) Whether Philippine law (other than MAAB 47) precludes or negates an agreement between the parties to have the deposits collectible outside of Manila.

(d) If there is no controlling Philippine law referred to in (c) above, what law does control?

(2) That the district court's supplemental findings of fact and conclusions of law, together with an amended judgment if appropriate, shall be filed in the district court not later than thirty (30) days from the date of this order and thereupon the clerk of the district court shall promptly certify to our Court a supplemental record containing said documents.

(3) That within ten (10) days after the district court files the documents referred to in (2) above, the parties (Citibank and WFAL) may serve and file in this Court supplemental letter briefs, not more than ten (10) pages in length, directed to the issues on this limited remand. No letter briefs from the amici curiae are requested.

(4) That thereupon this matter will be taken on submission. This Court, and particularly this panel, retains jurisdiction.

/s/ William H. Timbers
WILLIAM H. TIMBERS

/s/ Amalya L. Kearse
AMALYA L. KEARSE

/s/ J. Daniel Mahoney
J. DANIEL MAHONEY
Circuit Judges

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84-Civ.-996 (WK)

WELLS FARGO ASIA LIMITED

versus

CITIBANK, N.A.

May 28, 1987

Edwin E. McAmis, Skadden, Arps, Slate, Meagher & Flom, New York City (Mitchell C. Sockett, of counsel), and Darryl Snider, Brobeck, Phleger & Harrison, San Francisco, Cal. (Duncan E. Haynes, Jessica M. Hoover and Susan E. Samuels, of counsel), for plaintiff.

John E. Hoffman, Jr., Shearman & Sterling, New York City (Henry Weisburg, Jennifer Freeman, Robert S. Fischler and Melissa Samet, of counsel), for defendant.

Joyce E. Motylewski, Federal Reserve Bank of New York, Office of General Counsel, and New York Clearing House Ass'n, Sullivan & Cromwell, New York City (John L. Warden, H. Rodgin Cohen and Michael Straus, of counsel), for amici curiae.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

By this action, Wells Fargo Asia Limited ("Wells Fargo") seeks to recover from Citibank, N.A. ("Citibank") the balance concededly due on two one-million dollar time deposits (the "Deposits") with Citibank's Manila branch maturing respectively on December 9 and 10, 1983. Citibank declined payment on the maturity dates because of the existence of a Philippine governmental decree ("MAAB 47" or "the Decree") which forbade the repayment of the principal of certain foreign currency obligations without prior approval of the Central Bank of the Philippines ("Central Bank"). Citibank subsequently obtained approval for partial repayment and remitted to Wells Fargo the sum of $934,000. Citibank has declined any further payment, contending that it is excused by the Decree.

In July 1985 we denied Wells Fargo's motion for summary judgment. *Wells Fargo Asia Limited v. Citibank, N.A.* (S.D.N.Y.1985) 612 F.Supp. 351. The relevant facts are fully stated in that opinion, familiarity with which is assumed. Citibank resisted the motion for summary judgment by asserting that Philippine law governed the Deposits and that the Decree prohibited them from honoring plaintiff's demand without the permission of the Central Bank, which permission had been impossible to obtain. We concluded that the terms of the parties' agreement were far from clear and that an issue of fact had been presented by Citibank as to whether it could establish—by the proof of custom and usage—an agreed upon though unstated condition making the Deposits subject to Philippine sovereign risk, *i.e.*, the risk that the Philippine government would take action preventing repayment. We decided no legal question.

The case was tried before us without a jury in December 1986. Citibank presented evidence aimed at establishing that Wells Fargo had accepted Philippine sovereign risk and that the Deposits therefore are payable only in Manila and are governed by Philippine law Citibank again asserted that the Decree excused repayment. Wells Fargo—without abandoning its original contention that

Citibank had accepted the risk that it would be liable elsewhere for obligations incurred by its Manila branch —took the position that we need not decide who bears Philippine sovereign risk because the actions of the Philippine government do not excuse honoring the Deposits. In other words, Wells Fargo now contends that it must prevail even if we assume that the Deposits are payable only in Manila and are governed by Philippine law. There being substantial authority for the proposition that the situs of a bank deposit is the branch where the deposit is made and that the depositor's rights are governed by the law of that locality, *cf., e.g., Dunn v. Bank of Nova Scotia* (5th Cir.1967) 374 F.2d 876, we accept plaintiff's invitation to assume that Philippine law governs this action. We shall further assume that plaintiff can recover only if—and to the extent which—it would have recovered had it instituted this action in an appropriate Philippine tribunal.

Before we delve into Philippine law, a brief digression into banking terminology is necessary. Citibank's receipt of a Eurodollar deposit creates a liability of the bank, since it is equivalent to borrowing. The asset thereby obtained is either loaned out, deposited with another bank or otherwise invested. Although Citibank is an international corporation with worldwide assets and liabilities, it—like most other banks—maintains separate books for each of its branches. In the case of assets carried on the books of its Manila branch, those assets which are invested with entities situated in the Philippines are considered Philippine (or local) assets, while those deposited in banks located outside the Philippines or invested in non-Philippine enterprises are called non-Philippine assets. It is not disputed that the Decree currently prevents Citibank's Manila branch from using its Philippine assets toward repayment of the Deposits. It is further undisputed that Citibank was able to obtain Central Bank permission for its Manila branch to repay foreign de-

positors to the extent of the non-Philippine assets carried on the books of that branch, which resulted in the partial repayment of $934,000.

The dispute focuses on a third category of assets: assets booked at Citibank's offices outside the Philippines. Citibank concedes that a customer placing a deposit at a foreign branch would be entitled to call upon the bank's worldwide assets should the branch be unable to pay due to illiquidity, theft, fire, or a similar occurrence. It contends, however, that where the law of the country where the branch is located prevents repayment with assets booked at that branch, the depositor may not look elsewhere. As will be developed below, we conclude that Philippine law does not support Citibank's position.

With respect to Philippine law, we are presented with two conflicting affidavits by recognized Philippine authorities: Antonio V. Agcaoili on behalf of the defendant, and Gregorio R. Castillo on behalf of the plaintiff. We find Mr. Castillo's presentation to be far more persuasive and accept his conclusions.

Defendant's expert, Mr. Agcaoili, in an affidavit dated November 28, 1986, states that the Deposits are covered by the Decree, and concludes that the Decree creates a legal impossibility which prohibits Citibank from repaying them without prior Central Bank approval, thus excusing Citibank's performance until the requisite approval is granted (Par. 13). He does not explain how he arrives at these conclusions. He also observes that the Central Bank has not issued any forms or information regarding procedures to be followed in making a request for approval under MAAB 47, and that the lack of such procedures indicates the Central Bank's intention to discourage requests for repayment and not to grant such requests if made (Par. 9).

On the other hand, Mr. Castillo, in his affidavit executed on December 12, 1986, asserts that under Philippine law Citibank is obligated to repay deposits made in its

Manila branch with its assets wherever located throughout the world (Par. 4-6), and categorically concludes that the Decree in no way inhibits repayment (in Manila or anywhere else) of the Deposits as long as Citibank uses assets that are carried on the books of its non-Philippine offices. (Conclusion, Par. 17). The reasoning behind these conclusions is spelled out in Paragraphs 2-6:

2. In the case of a deposit booked at the Manila office of a non-Philippine bank such as Citibank, MAAB 47 does not apply to repayment of the deposit with non-Philippine assets. "Non-Philippine assets" are assets that are carried on the books of the bank's non-Philippine offices.

3. Accordingly, under Philippine law, Citibank may repay the Deposits at issue in this case without prior Central Bank approval, as long as it uses non-Philippine assets for that purpose.(Such repayment may be made through Citibank's branch in Manila or anywhere else in the world).

4. Under Philippine law, branches of banks are not separate legal entities apart from the bank as an institution. As stated by the Philippine Supreme Court in *National City Bank of New York v. Posadas*, 60 Phil 630 (1934), (affirmed by the United States Supreme Court in *Posadas v. National City Bank of New York* (1936) 296 U.S. 497 [56 S.Ct. 349, 80 L.Ed. 351]):

> "The local branches of the National City Bank of New York have no separate corporate franchise, no separate capital stock, and are controlled directly through officers and managers appointed by the National City Bank of New York . . .
>
> A branch is simply an extension of a national bank to foreign countries, [and] the branch of

> the National City Bank of New York in Manila is the National City Bank of New York doing business in Manila."

Accordingly, under Philippine law, obligations incurred at a branch are obligations of the bank as a whole. Citibank, the institution, is the legal entity that entered into the Deposit contracts at issue in this case, not its Manila branch.

5. Under . . . the Civil Code of the Philippines, the obligation of a bank under a deposit contract is not to return the very same funds deposited, but rather to repay funds of the same kind and amount. The funds to repay a deposit need not be funds booked at the same branch that booked the deposit. Rather, under Philippine law a depositor may look to any of the bank's assets, wherever located for repayment of a deposit.

6. In short, under Philippine law, Citibank's obligation to repay the Deposits is not limited to the assets booked at its Manila branch ("local assets").

Mr. Agcaoili's affidavit, which was dated some two weeks prior to Mr. Castillo's, could not, of course, address itself to these specific observations. We find it significant, however, that Citibank apparently thought it inadvisable to attempt a reply affidavit.

We would not, of course, accept Mr. Castillo's conclusions simply because of Citibank's failure effectively to contest them unless we were satisfied that they are correct. *See*, Fed.R.Civ.P. 44.1. We are so satisfied. Mr. Castillo's first conclusion—that under Philippine law, an obligation incurred by a branch is an obligation of the bank as a whole—is supported by the Philippine authority cited. We know of no Philippine authority to the contrary. The cases from other jurisdictions upon which Citibank relies are inapposite, as they all involve ex-

propriation by a foreign government of a branch's assets, which, under the law of each respective locality, prevented repayment at the situs where the deposit was made. *E.g.*, *Perez v. Chase Manhattan Bank* (1984) 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5, *cert. denied* (1984) 469 U.S. 966, 105 S.Ct. 366, 83 L.Ed.2d 302; *Tillman v. National City Bank* (2d Cir.) 118 F.2d 631, *cert. denied* (1941) 314 U.S. 650, 62 S.Ct. 96, 86 L.Ed. 521; *Dunn v. Bank of Nova Scotia* (5th Cir.1967) 374 F.2d 876 (limited expropriation by taxation). While these cases could support the proposition that Philippine law controls this action, they shed no light on the question of what the applicable Philippine law may be.

Mr. Castillo's second conclusion—that repayment with Citibank's worldwide assets would not violate the Decree—is sustained by the evidence. The Philippine Central Bank has already specifically allowed Citibank's Manila branch to use its non-local assets in partial discharge of plaintiff's claim (as well as the claims of other foreign depositors). As cogently explained by Rafael Buenaventura, Citibank's Country Corporate Officer in the Philippines during the relevant time period, the essential purpose of the Decree was to prevent the outflow of foreign exchange from the Philippines. The Decree was enacted in response to a severe loss of foreign exchange which threatened the Philippines' ability to import fuel, food, medicines and raw materials, and other items for which foreign exchange is necessary. However, as both Dr. Ian Giddy (Citibank's expert witness as to banking practices) and Mr. Buenaventura testified, the Philippine government's concerns are not implicated by repayment with funds held by banks not domiciled in the Philippines (or, presumably, by calling in loans made to non-Philippine entities). Since these assets are already located outside the Philippines, and therefore are not part of the country's foreign exchange reserves, there is no outflow of foreign currency. Tr. 911-13, 920-921, 1018-19.

Furthermore, plaintiff has presented us with a communication from Philippine authorities specifically disavowing any objection to discharging the remainder of the obligation using funds from Citibank's non-Philippine offices. Pl.Ex. 59. That telex, dated December 14, 1984, states:

> If there is a judgment by a court or an extrajudicial settlement to the effect that a foreign curency [sic] deposit placed with a foreign currency deposit unit ('FCDU') of the Philippine branch of a foreign bank is recoverable from a non Philippine office of such foreign bank and if such liability is satisfied from assets held outside the Philippines and does not result, directly or indirectly, in a net outflow of foreign currency from the Philippines the Central Bank of the Philippines is of the view that the satisfaction of payment of such deposit liability on these terms would not be inconsistent with [the Decree].

The Central Bank's reasoning is obvious: assets carried on the books of Citibank's non-Philippine offices have no connection to the Philippines and are beyond the control of the Philippine government. Mr. Castillo's conclusion that the Decree was not intended to require Central Bank permission for the use of such funds to discharge plaintiff's claim therefore seems wholly reasonable.

In summary, we conclude that under Philippine law Citibank's worldwide assets are available for satisfaction of plaintiff's claim, and that the Decree does not prevent transfer of such assets from outside the Philippines to Manila in order to repay the Deposits. The foregoing conclusion renders irrelevant most of the questions the parties have disputed before us. However, we shall briefly comment on some of them.

Since each party to some extent tried to establish the existence of a custom or practice in international banking which might modify the meaning of their deposit

agreement, we shall simply observe that no relevant custom or practice was established by either party.

As indicated in footnote number 2 of our summary judgment opinion, there was dispute between the parties as to whether or not Citibank's Eurodollar deposits earned the same interest if made in secure localities such as London or in presumably riskier places such as Manila. For reasons stated at oral argument, we resolve that issue in plaintiff's favor and find Citibank's Eurodollar interest rate to be identical in all localities.

There was much dispute as to the meaning and impact of Federal Reserve Regulation D, which exempts from reserve requirements a deposit payable only at a foreign branch of a U.S. bank.[1] Foreign branch deposits which are guaranteed by a promise of payment in the United States are subject to federal reserve requirements. Since Regulation D is generally interpreted to exempt Eurodollar deposits from federal reserve requirements, Citibank argued that the regulation demonstrates an understanding in the banking community that such deposits are payable only at the branch where made, and subject to the law of the host country. As we have accepted—for the purposes of this lawsuit—the proposition that the deposits were payable only in Manila and subject to Philippine law, this argument has become moot.

There was also much discussion of the Act of State doctrine. The doctrine applies when judicial consideration of a foreign government's act is likely to have a negative impact upon the executive branch's conduct of international affairs. If adjudication would embarrass or hinder the executive in the realm of foreign relations, the court should refrain from inquiring into the validity

[1] Federal law provides that depository institutions, such as Wells Fargo and Citibank, are required to set aside reserves equal to a specified portion of the deposits they receive. 12 C.F.R. § 204.1 *et seq.* (1986).

of the foreign state's act. *Allied Bank International v. Banco Credito Agricola de Cartago* (2d Cir.) 757 F.2d 516, 520-21, *cert. dismissed* (1985) —— U.S. ——, 106 S.Ct. 30, 87 L.Ed 2d 706. In view of our conclusion that neither Philippine law nor policy are in any way offended by the requirement that Citibank repay these Deposits, the Doctrine is in no way implicated.

In relation to Citibank's defense of impossibility of performance, we made a finding at the close of the trial that Citibank had satisfied its good faith obligations to procure the government's consent to the repayment of these deposits. In the light of our interpretation of the Decree, that finding becomes irrelevant. However, if the Decree should be interpreted (as Citibank urges) to require Central Bank permission in order to make payment at the Manila branch with Citibank assets transferred to Manila for that purpose, we would be required to modify our finding. There is nothing in the record to suggest that Citibank made the slightest effort to obtain such consent. On the contrary, everything suggests that approval would have been readily granted if requested. Thus, the impossibility defense would fail even if the Decree were interpreted to require such consent.

In view of the testimony by Citibank's expert witness, Dr. Ian Giddy, to the effect that any decision in this case might give rise to concern in the banking community if it were misconstrued (Tr. 1034-1035) we wish to emphasize the limits of our holding. We deal only with two specific deposits payable in Manila on December 9 and 10, 1983 and governed by the particular Decree we have discussed. We have not considered the law of any other jurisdiction, or what would have happened in Manila had the Philippine government, through taxation or the exercise of any other sovereign power, sought to expropriate any part or all of these Deposits, or if it had sought to confiscate the assets of any depositor or class of depositors, or had in any way impeded or sought

to impede the payment of the Deposits with non-Philippine assets to any depositor or class of depositor. Neither have we evaluated the new confirmation slips which we are told Citibank has begun using since the events here in issue, and we do not speculate as to what effect, if any, they may have on future transactions in the Eurodollar market.

Let the plaintiff submit an appropriate judgment on 10 days notice.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84-Civ.-996 (WK)

WELLS FARGO ASIA LIMITED

v.

CITIBANK, N.A.

July 6, 1987

Judgment of the United States District Court for the Southern District of New York

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Before: WHITMAN KNAPP, District Judge.

JUDGMENT

This action having come on for trial before the Court, Honorable Whitman Knapp, District Judge, presiding, and the issues having been tried and a decision having been duly rendered on May 28, 1987 and the Court concluding that judgment should be entered for plaintiff herein, and the Court directing that plaintiff submit a proposed judgment,

It is ORDERED, ADJUDGED and DECREED that

Plaintiff Wells Fargo Asia Limited recover from defendant Citibank, N.A. the sum of $1,066,000, with

interest thereon from the date hereof, at the rate provided by law, plus all costs of this action.

Dated: New York, New York
July 6, 1987

/s/ [Illegible]
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84-Civ.-0996 (WK)

WELLS FARGO ASIA LIMITED

versus

CITIBANK, N.A.

July 2, 1985

Skadden, Arps, Slate, Meagher & Flom by Edwin E. McAmis, New York City, for plaintiff.

Shearman & Sterling by John E. Hoffman, Jr., New York City, for defendant.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

Plaintiff, Wells Fargo Asia Limited, moves for summary judgment for non-payment of certain overdue non-negotiable time deposits placed with the Philippine branch of defendant Citibank.

Plaintiff at all times relevant to this lawsuit was a bank chartered to do business by the government of Singapore and a wholly-owned subsidiary of Wells Fargo Bank, National Association, a federally chartered bank based in San Francisco, California. Citibank is a na-

tional bank chartered under the National Bank Act, 12 U.S.C. § 21 *et seq.*, with its corporate headquarters in New York. Citibank has a branch office ("Citibank/ Manila") in Manila, the Philippines.

On June 10, 1983 plaintiff placed two six-month non-negotiable U.S. $1,000,000 deposits with Citibank/ Manila. The deposits were to earn interest at the rate of 10% and mature on December 9 and 10, 1983. In October 1983, however, the Philippine government forbade repayment of the principal of certain foreign currency obligations without the prior approval of the Central Bank of the Philippines (the "Central Bank"). Citibank did not receive such approval, and did not repay the deposits on maturity.

Citibank asserts that issues of fact exist pertaining to the parties' understanding of the deposit contract, and whether or not plaintiff assumed the risk that repayment might be affected by Philippine law. Plaintiff has denied having had any understanding that it was assuming this risk and asserts in support of its motion that the deposits bore an unconditional repayment date, that repayment is overdue, and that, as a matter of law, the main office of Citibank is liable for the obligations of its Manila branch.

BACKGROUND

Eurodollar Transactions

At the nub of this case is the treatment to be accorded to a particular kind of time deposit denominated in U.S. dollars which is maintained in a banking institution outside of the United States (the "receiving bank"), commonly called a "Eurodollar" deposit. The case before us presents a deposit of "Asiadollars," or a dollar-denominated deposit made in an Asian country. These transactions in general bear a higher rate of interest than similar transactions within the United States.

Thus, at the time plaintiff made the deposits here at issue, domestic banks were granting an interest rate of approximately 8.85%, while Eurodollar (or "Asia-dollar") deposits bore an interest rate of about 10%.

The reason for this difference in interest rate is disputed. The parties agree that one of the reasons is that banks operating abroad are free from the reserve requirements imposed by the Federal Reserve Board and Federal Deposit Insurance Corporation upon banks operating within the United States. In addition, they are in accord that in the event a third person (*e.g.*, a bank robber) or an act of nature (*e.g.*, flood or fire) disabled the branch bank from timely repaying deposits made with it, the main office would assume liability. The parties' view of the Eurodollar market diverges after these two areas of accord, and their differences go to the heart of the propriety of a disposition by summary judgment.

Citibank posits that aside from the category of disabling events mentioned above for which the main office would assume liability, which it terms "credit risk," there also exists a "soverign risk" for which its main office denies liability. Such sovereign risk results from the acts of the foreign government (*e.g.*, confiscation) in whose jurisdiction the deposits are held which prevent repayment by the foreign-based branch. It suggests that the main office would not bear liability for such acts because the depositor assumes the risk that the foreign government might so act and, in effect, bargains for a higher interest rate in exchange for the risk.

The positions of the respective parties are set forth, on the one hand, in plaintiff's denial of two of Citibank's Requests for Admissions and, on the other hand, in an affidavit submitted by Citibank. The two Citibank requests for admissions (denied by plaintiff) are:

[Request 2] WF Asia [plaintiff] understood that Citibank's obligation to repay the WF Asia deposits was subject to Philippine law.

[Request 62] In deciding to place the deposits in Manila, WF Asia considered the risk of placing funds in the Philippines and the interest rate Citibank Manila offered to pay on the deposits.

The affidavit submitted by Citibank is that of Ian H. Giddy, a professor of international finance at the New York University Graduate School of Business. Professor Giddy states at ¶ 32 of his affidavit:

During the course of seminars and conventions with hundreds of international bankers during the past ten years, I have never had occasion to hear a banker deny that Eurodollar deposits are subject to the sovereign risk of the country in which the deposits are placed. Accordingly it is inconceivable to me that the staff at [Wells Fargo] Asia responsible for placing the deposits at issue did not understand that these deposits were subject to Philippine sovereign risk.

Professor Giddy explains that the existence of such a "sovereign risk" causes many depositors to place limits on the amount of Eurodollar transactions permitted in a particular bank or country.

He identifies two forms of Eurodollar deposits: negotiable deposits and non-negotiable deposits, sometimes called off-shore deposits. It is the second type of transaction which is here at issue. Because in the case of negotiable deposits (the first type) it is necessary to put potential transferees on notice of the terms of payment, it is apparently standard practice to include a legend on the certificate of deposit to the effect that the instrument is governed by and construed in accordance with the laws of the particular foreign country in which the deposit

is held. In the case of non-negotiable deposits, such as those before us, this legend is, the Professor asserts, unnecessary since there are no possible transferees. He asserts, however, that all non-negotiable certificate depositors understand that the same rules apply.

Professor Giddy further teaches that Eurodollar deposits between banks are often arranged through independent brokers which collect information from banks, such as the amount of dollars they are willing to lend or borrow and the interest rate they seek or are willing to provide. Such information is shared among other potential borrowers or lenders, and the broker matches willing participants.

Payments into and from Eurodollar accounts, which are conducted through an interbank clearing system, are apparently made through telexed instructions to credit and debit demand accounts located in banks in the United States. The bank within the United States at which such demand account is kept is called the "clearing" or "correspondent" bank. This bank does not generate the payment or repayment instructions, which originate instead with the foreign bank on whose behalf the demand account is kept. Professor Giddy maintains that no significance is attached to the identity of the clearing or correspondent bank. Through the affidavit of Donald S. Howard, Executive Vice President and Chief Financial Officer of Citicorp and Citibank, N.A., Citibank asserts that Eurodollar payments are cleared through the main office of Citibank in New York because dollar transactions are cleared through the United States, just as sterling transactions are cleared through London, and franc transactions through Paris.

Mr. Howard's affidavit in addition asserts by reference to a 1973 letter from its former president that it is "Citibank [sic] position that, as an institution, it is responsible for any breach of agreement by an overseas branch but, if the failure to perform is due to such

branch's compliance with the law to which it is subject, then the failure does not constitute a breach for which either the branch or the institution as a whole is responsible." Such policy, according to Mr. Howard, was in August 1983 disseminated by the bank's policy manual to Citibank officers around the world.

The Written Deposit Contract

The written contract between plaintiff and Citibank/Manila is made up of several confirmations and computer-generated telexes among the parties and the independent broker which arranged the deposits, and a statement of "Terms and Conditions" apparently sent to plaintiff after the deposits were placed.[1]

On June 10, 1983, Citibank/Manila indicated to the independent broker that it wished to borrow U.S. dollars that day. The independent broker's confirmation that day designated Citibank/Manila as "Borrower" and plaintiff as "Lender." Payment was to be made to "Citibank, N.A., New York Account Manila." Repayment was directed to "Wells Fargo International, New York Account, Wells Fargo ABIA Asia, Ltd., Singapore Account #003-023645." On June 14th plaintiff confirmed each deposit and instructed Wells Fargo New York ("our correspondent") to pay to Citibank, New York ("customer's correspondent") the required sums. These confirmations were accompanied by computer-generated telexes. Citibank/Manila's telex states:

> Please remit U.S. DLR 1,000,000.00 to our account with Citibank New York. At maturity we remit U.S. DLR 1,050,277.78 to your account with Wells

[1] For the purposes of this motion only, in which we construe the submissions in a light most favorable to the party opposing summary judgment, *see United States v. Diebold, Inc.* (1962) 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176, we treat this statement as though it were part of the contract of deposit.

> Fargo Bank Intl. Corp. N.Y. through Citibank New York.

Plaintiff's confirmation states:

> We shall instruct Wells Fargo Bk Intl New York to pay to Citibank, N.A. 399 Park Avenue, New York, N.Y. 10022 U.S.A. Please pay to our A/C with Wells Fargo Bk Intl New York.

The independent broker's confirmation reads:

> Settlement—Citibank N.A. NYK AC Manila Repayment-Wells-Fargo Bk Intl, NYK AC Wells Fargo Asia Ltd SGP No. 003-023645.

Paragraph 6 of the statement of Citibank's Terms and Conditions provides:

> The bank shall have no responsibility for or liability to the undersigned for . . . the unavailability of such funds due to restrictions on convertibility, requisitions, involuntary transfers, distraints of any character . . . or other similar causes beyond the bank's control.

The Philippine Decree

As indicated above, on October 15, 1983, the Philippine government issued a "Memorandum to Authorized Agent Banks" ("MAAB 47") which provided in full:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.
>
> *Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours*

in New York City on October 14, 1983, shall not be reduced without prior Central Bank approval.

These measures shall apply to payments value dated during the period October 17, 1983 to January 16, 1984.

Appropriate sanctions shall be imposed on banks which fail to strictly comply with this directive. (Emphasis supplied.)

Raphael Buenventera, a senior vice-president of Citibank and the Country Corporate Officer for Citibank in the Philippines, has submitted an affidavit dated February 28, 1985 which attests in substance that following receipt of MAAB 47, he engaged in daily discussions with officials of the Central Bank, including three meetings with the governor of that institution who, in response to Mr. Buenventera's questions, "repeatedly and consistently stated that, in accordance with the requirements of [MAAB 47], foreign currency deposits placed by foreign financial institutions with Citibank Manila were frozen and that no payment would be allowed." Affidavit of Raphael Buenventera, ¶ 16. No written demand to permit payment was made prior to the maturity date of the Wells Fargo deposits.

Citibank did not pay plaintiff's deposits when they matured on December 9 and 10, 1983, and on February 10, 1984, plaintiff commenced the instant action. On February 20, 1984 Citibank/Manila applied to the Central Bank for permission to repay certain deposits, which request was granted on March 23, 1984 to the extent of repayment with Citibank/Manila's non-Philippine assets. This amounted to 46% of the sum due plaintiff. Citibank/Manila has continued to pay to the plaintiff the interest due on the remaining sum.

DISCUSSION

The support for plaintiff's position that Citibank, N.A. is liable as a matter of law for the obligations of its branch, regardless of the ability of that branch itself to effect payment, is summed up by our Court of Appeals in *Vishipco Line v. Chase Manhattan Bank, N.A.* (2d Cir.1981) 660 F.2d 854, 863, *cert. denied* (1982) 459 U.S. 976, 103 S.Ct. 313, 74 L.Ed.2d 291, as follows:

> . . . [I]mpossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch.
>
> * * * *
>
> U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank.

See Garcia v. Chase Manhattan Bank, N.A. (2d Cir. 1984) 735 F.2d 645; *Sokoloff v. National City Bank* (S.Ct.N.Y.Cty.1927) 130 Misc. 66, 73, 224 N.Y.S. 102, 114.

While the parties disagree as to the reasons a Eurodollar deposit differs from one made within the United States, there is no dispute that it does. If plaintiff is correct that the holdings in the above-cited cases here apply, then Citibank, N.A. would appear to bear liability for the failure of Citibank/Manila. However, we think it clear that had plaintiff's deposits borne the legend we are informed is routinely inscribed on negotiable Eurodollar deposits, to the effect that the instrument was governed by and was to be construed in accordance with the law of the Philippines, the above-cited cases would not make the home office liable when the branch was

disabled from performance because of Philippine law. We therefore find the question before us to be whether the contract should be subjected to proof of an agreed-upon, though unstated, condition to the same effect, based on usage in the Eurodollar trade and the parties' understanding of the deposit terms which derived from such custom.

There are at least two areas in which the parties' interpretations of the terms of their contract vary, and which have material bearing on Citibank's liability. The first is whether the deposits at issue were subject to a "sovereign" risk as it is defined by Citibank. Professor Giddy finds it "inconceivable" that a sophisticated international bank depositer would claim ignorance of what he contends are the known rules of the Eurodollar deposit game, the most pertinent of which is that a consideration for the higher interest rate earned by a Eurodollar deposit is the depositor's agreement to assume a "sovereign risk." Plaintiff denies Citibank's Requests for Admissions that it had an understanding that its deposits were subject to Philippine law. It contends that the higher interest rate is a function solely of the foreign branch bank's freedom from reserve requirements.[2] Related to this dispute is the question whether, assuming Citibank's statement of Terms and Conditions was part of the contract, its disclaimer of liability for the "unavailability of funds due to restrictions on convertibility, requisitions, involuntary transfers, distraints of

[2] Plaintiff makes a cogent argument that the theory propounded by Citibank to explain the higher rate of interest borne by a Eurodollar deposit—that the depositer assumes a sovereign risk—is considerably undercut by the fact that the higher rate of interest is uniform among countries whose governments might be regarded as more or less "risky" than others. Thus, the Manila deposits here at issue bore the same rate of interest as those placed in London, Frankfurt and Singapore on the same day. Suggestive as this circumstance might be, we believe whether the validity of Citibank's position is thereby undermined is a question for the trier of fact.

any character . . . or other similar causes beyond the bank's control" encompassed the Philippine decree.

The second area of disagreement is over Citibank's ability to assert the affirmative defense of the Act of State doctrine.[3] As a threshold matter, the validity of that defense turns on whether the debt was located in the Philippines with the result that the purported "taking" effected by MAAB 47 came "to complete fruition within the dominion of the [Philippine] government." *Allied Bank International v. Banco Credito Agricola de Cartago* (2d Cir.1985) 757 F.2d 516, 521, *quoting Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.* (5th Cir.) 392 F.2d 706, 715-16, *cert. denied* (1968) 393 U.S. 924, 89 S.Ct. 255, 21 L.Ed.2d 260. If the deposit was not located in the Philippines, Citibank's defense would be unavailable. *See Allied Bank International, supra* (defense unavailable to Costa Rican bank which conceded jurisdiction in New York and agreed to pay debt in New York City); *Garcia v. Chase Manhattan Bank* (2d Cir.1984) 735 F.2d 645 (doctrine inapplicable where bank employee made explicit assurance that debt was repayable in any branch around the world); *Vishipco Line v. Chase Manhattan Bank, N.A.* (2d Cir.1981) 660 F.2d 854 (Act of State doctrine inapplicable where situs of debt was no longer Vietnam); *but see Perez v. Chase Manhattan Bank, N.A.* (1984) 61 N.Y.2d 460, 471, 474, N.Y.S.2d 689, 463 N.E.2d 5 (even where debt was pay-

[3] Plaintiff maintains that because it does not challenge the validity of the Philippine government's actions pursuant to MAAB 47, but simply relies upon Citibank's liability for the debts of its branch banks under the ruling in *Vishipco Line, supra*, the Act of State doctrine is irrelevant. We do not believe, however, that this holding extends so far. In *Vishipco Line* the doctrine was not applied because it was determined that Vietnam was not the situs of the debt at the time of confiscation. 660 F.2d at 862-63. The court thus did not reach the question whether, assuming that the situs of the debt had been Vietnam, the home office would nonetheless be liable.

able in both United States and Cuba, Cuban government's confiscation gave rise to valid Act of State defense). If it were payable in the Philippines, however, the doctrine might prove successful. *See Braka v. Bancomer* (2d Cir. 1985) 762 F.2d 222 (doctrine applies to non-payment of deposits which on their face indicated that Mexico was the place of deposit and payment). Plaintiff maintains that the computer-generated telexes indicate the deposits were payable (and therefore sited) in New York. Citibank counters that these telexes indicate merely that the New York office was the clearing, or correspondent bank, and that such a bank cannot be deemed the repository of the debt. It asserts that it had no control over whether and when deposits were to be repaid, such instructions necessarily originating from Citibank/Manila.

We have recently been reminded that summary judgment is improper unless the terms of a contractual agreement are wholly unambiguous. *Wards Co., Inc. v. Stamford Ridgway Associates and Trim Fashions, Inc.* (2d Cir.1985) 761 F.2d 117. Thus, unless plaintiff has demonstrated that the contractual language involved is not "susceptible of at least two fairly reasonable meanings," *id.* at 120, *quoting Schering Corp. v. Home Insurance Co.* (2d Cir.1983) 712 F.2d 4, 10, "a material issue exists concerning the parties' intent, and the non-moving party has a right to present extrinsic evidence negating the meaning of the contested term." *Wards, supra* at 120; *accord Heyman v. Commerce and Industry Insurance Co.* (2d Cir.1975) 524 F.2d 1317, 1320. In the instant case, such extrinsic evidence would permissibly encompass evidence of the parties' intent, especially as it derives from custom and usage in the Eurodollar trade.

The authorities cited by plaintiff are not to the contrary. All of them concerned contracts whose terms a reasonable person could not help but understand, in contrast to the enigmatic and sparse phrases which comprise the contract before us. In addition, those cases turned on

the fact that the suggested custom or usage did not support the non-moving party's interpretation, *Croce v. Kurnit* (2d Cir.1984) 737 F.2d 229, 238; *Cable Wiedemer, Inc. v. A. Friederich & Sons, Inc.*, (Monroe Cty. 1972) 71 Misc.2d 443, 336 N.Y.S.2d 139, or contradicted what was otherwise a clear and unambiguous term of the contract, *Croce, supra*; *Kologel Co. v. Down in the Village, Inc.* (S.D.N.Y.1972) 539 F.Supp. 727 (where person entitled to delivery of goods was explicitly named as "consignee," evidence of trade usage could not modify such designation); *Salzman v. Boyer Products, Inc.* (1st Dept.1973) 42 A.D.2d 531, 344 N.Y.S.2d 755 (agreement confirming unconditional nature of two loans may not be modified by evidence of oral condition), or was inconsistent with clearly established law. *Avedon v. Exstein* (S.D.N.Y. 1956) 141 F.Supp. 278 (in light of long line of cases to effect that rights to delivered photograph are in customer who hired photographer and not in photographer, evidence of custom incompetent to show rights were in photographer); *Colten v. Jackes Marchais, Inc.* (Mun. Ct.1946) 61 N.Y.S.2d 269 (custom and usage cannot alter law that customer obtains proprietary rights in photo negatives).

We find the words and phrases of the various documents before us far from clear enough to eliminate the possibility that the parties intended to subject these deposits to the same conditions as those of negotiable deposits which, because of their transferability, explicitly bear the proviso that the deposit is subject to the law of the country in which it is placed. Similarly, we are unable conclusively to state that the deposits were not sited in the Philippines. The confirmations and telexes superficially support Citibank's theory that its New York office was the "correspondent" bank for Citibank/Manila, just as Wells Fargo Bank, National Association was the "correspondent" for plaintiff. The ultimate significance or lack thereof to be given these terms will depend on

what the trier of fact determines to have been the parties' understanding of them as they were used in the Eurodollar trade. Recognizing that our task on a motion for summary judgment is "issue-finding, not issue-resolution," *United States v. One Tintoretto painting entitled "the Holy Family with Saint Catherine and the Honored Doctor"* (2d Cir.1982) 691 F.2d 603, 606; *see also Sillman v. Twentieth Century Fox* (1957) 3 N.Y.2d 395, 398, 404, 165 N.Y.S.2d 498, 499, 505 ("issue-finding rather than issue-determination is the key to the procedure"), and finding that Citibank has substantiated the existence of a genuine dispute as to material issues, *see Schering Corp., supra,* 712 F.2d at 9, we deny plaintiff's motion.

Related to Citibank's possible defenses of impossibility of performance and preclusion by the Act of State doctrine is whether Citibank may assert them in the first instance. MAAB 47 did not by its terms prohibit repayment of foreign deposits, but simply required that Central Bank approval be obtained prior to the making thereof. Plaintiff contends that Citibank has not shown that it ever attempted to gain such approval, and therefore cannot raise the decree to shield it from liability. After we expressed our sympathy with this position at oral argument, Citibank submitted the affidavit of Raphael Buenventera, its chief officer in the Philippines, the most persuasive portion of which we find to be his statement that, prior to the maturity date of Wells Fargo's deposits, he inquired into the effect of the decree and was unequivocally told by the Governor of the Central Bank that all foreign payments were "frozen." When the "government or other restraint does not render performance absolutely impossible, it is the duty of the promisor to make a bona fide effort to dissolve and be relieved of the restraint which operates to prevent his performance." *Brown v. J.P. Morgan* (N.Y.Cty. 1941) 177 Misc. 626, 31 N.Y.S.2d 323, 334, *rev'd on other grounds* (1st Dep't 1943) 265 A.D. 631, 40 N.Y.S.2d

229, *aff'd* (1946) 295 N.Y. 867, 67 N.E.2d 263. We believe that a trier of fact could construe Mr. Buenventera's efforts as a "bona fide effort" to obtain approval, and that the response he received demonstrated that his effort had failed. *See Dezsofi v. Jacoby* (N.Y. Cty.1942) 178 Misc. 851, 36 N.Y.S.2d 672, 674. We thus find a question of fact to exist with regard to the sufficiency of Citibank's efforts to comply with MAAB 47 and its consequent standing to raise any of its affirmative defenses.

It appearing that—at least in the several areas here enumerated—there are factual disputes which may have a material bearing on Citibank's liability, we deny plaintiff's motion for summary judgment. A status conference shall be held in Chambers on September 30, 1985, at 9:30 a.m., to discuss further proceedings in this action.

SO ORDERED.

APPENDIX G

12 U.S.C. § 461(b) (1982)

§461. Reserve requirements

(b) Additional definitions . . . reserves related to foreign obligations or assets; exemption for certain deposits . . .

* * * *

(2)(A) Each depository institution shall maintain reserves against its transaction accounts as the Board may prescribe by regulation solely for the purpose of implementing monetary policy—

(i) in the ratio of 3 per centum for that portion of its total transaction accounts of $25,000,000 or less, subject to subparagraph (C); and

(ii) in the ratio of 12 per centum, or in such other ratio as the Board may prescribe not greater than 14 per centum and not less than 8 per centum, for that portion of its total transaction accounts in excess of $25,000,000, subject to subparagraph (C).

(B) Each depository institution shall maintain reserves against its nonpersonal time deposits in the ratio of 3 per centum, or in such other ratio not greater than 9 per centum and not less than zero per centum as the Board may prescribe by regulation solely for the purpose of implementing monetary policy.

(C) Beginning in 1981, not later than December 31 of each year the Board shall issue a regulation increasing for the next succeeding calendar year the dollar amount which is contained in subparagraph (A) or which was last determined pursuant to this subparagraph for the purpose of such subparagraph, by an amount obtained by multiplying such dollar amount by 80 per centum of the percentage increase

in the total transaction accounts of all depository institutions. The increase in such transaction accounts shall be determined by subtracting the amount of such accounts on June 30 of the preceding calendar year from the amount of such accounts on June 30 of the calendar year involved. In the case of any such 12-month period in which there has been a decrease in the total transaction accounts of all depository institutions, the Board shall issue such a regulation decreasing for the next succeeding calendar year such dollar amount by an amount obtained by multiplying such dollar amount by 80 per centum of the percentage decrease in the total transaction accounts of all depository institutions. The decrease in such transaction accounts shall be determined by subtracting the amount of such accounts on June 30 of the calendar year involved from the amount of such accounts on June 30 of the previous calendar year.

(D) Any reserve requirement imposed under this subsection shall be uniformly applied to all transaction accounts at all depository institutions. Reserve requirements imposed under this subsection shall be uniformly applied to nonpersonal time deposits at all depository institutions, except that such requirements may vary by the maturity of such deposits.

* * * *

(6) The requirements posed under paragraph (2) shall not apply to deposits payable only outside the States of the United States and the District of Columbia, except that nothing in this subsection limits the authority of the Board to impose conditions and requirements on member banks under section 25 of this Act [12 U.S.C. 601 et seq.]or the authority of the Board under section 3105 of this title.

* * * *

APPENDIX H

12 U.S.C. § 601 (1982)

§ 601. Authorization, conditions and regulations

Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Board of Governors of the Federal Reserve System for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, the following powers: First. To establish branches in foreign countries or dependencies or insolar possessions of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agents of the United States.

* * * *

APPENDIX I

12 U.S.C. §§ 1811, 1813 (1982)

§ 1811. Creation of Corporation; duties

There is created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation") which shall insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this chapter, and which shall have the powers hereinafter granted.

* * * *

§ 1813. Definitions

As used in this chapter—

(d) The term "national member bank" means any national bank located in any of the States of the United States, the District of Columbia, any Territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which is a member of the Federal Reserve System.

* * * *

(*l*) The term "deposit" means—

* * * *

(5) such other obligations of a bank as the Board of Directors, after consultation with the Comptroller of the Currency and the Board of Governors of the Federal Reserve System, shall find and prescribe by regulation to be deposit liabilities by general usage, except that the following shall not be a deposit for any of the purposes of this chapter or be included as part of the total deposits or of an insured deposit:

(A) any obligations of a bank which is payable only at an office of such bank located outside of the States of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, the Trust

Territory of the Pacific Island, and the Virgin Islands; and

(B) any international banking facility deposit, including an international banking facility time deposit, as such term is from time to time defined by the Board of Governors of the Federal Reserve System in regulation D or any successor regulation issued by the Board of Governors of the Federal Reserve System.

* * * *

APPENDIX J

35 FEDERAL REGISTER 2768 (1970)

PART 204—RESERVES OF MEMBER BANKS

PART 217—INTERESTS ON DEPOSITS

Deposits in Foreign Branches

§ 204.112 Deposits in foreign branches guaranteed by domestic office of member bank.

(a) In accepting deposits at branches abroad, some member banks are reported to have entered into agreements from time to time with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment. The question has arisen whether such deposits are subject to this Part 204 and Part 217 of this chapter (Regs. D and Q), and this interpretation is intended as a clarification.

(b) Section 19 of the Federal Reserve Act provides that the limitations prescribed therein on rates of interest paid on deposits are not applicable to deposits of a member bank "payable only at an office thereof located outside the States of the United States and the District of Columbia" (12 U.S.C. 371a). The Board ruled in 1918 that the requirements of section 19 as to reserves to be carried by member banks also do not apply to foreign branches (1918 Federal Reserve Bulletin 1123).

(c) In the Board's judgment, the applicability of these exemptions from Regulation Q and Regulation D is limited to deposits in foreign branches as to which the depositor is entitled, under his agreement with the bank, to demand payment only outside of the United States, regardless of special circumstances. Said exemptions are intended principally to enable foreign branches of U.S.

banks to compete on a more nearly equal basis with other banks in foreign countries in accordance with the laws and regulations of those countries. A customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals. When payment of a deposit in a foreign branch is guaranteed by a promise of payment at a banking office in the United States if not paid at the foreign office, the depositor no longer assumes such risk, but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the bank. To assure the effectiveness of Regulations D and Q and to prevent evasions thereof, the Board considers that such guaranteed foreign-branch deposits must be subject to those regulations.

(d) Accordingly, a deposit in a foreign branch of a member bank that is guaranteed by a domestic office is subject to the interest rate limitations and reserve percentages of Regulations Q and D the same as if the deposit had been made in the domestic office.

(e) This interpretation is not designed in any respect to prevent the head office of a U.S. bank from repaying borrowings from, making advances to, or supplying capital funds to its foreign branches.

§ 217.146 Deposits at foreign branches guaranteed by domestic office of member bank.

For text of this interpretation see § 204.112 of this subchapter.

* * * *

APPENDIX K

MEMORANDUM TO AUTHORIZED AGENT BANKS

Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours in New York City on October 14, 1983, shall not be reduced without prior Central Bank approval.

These measures shall apply to payments value dated during the period October 17, 1983 to January 16, 1984.

Appropriate sanctions shall be imposed on banks which fail to strictly comply with this directive.

For the Monetary Board:

/s/ Gabriel C. Singson
Gabriel C. Singson
Senior Deputy Governor

MAAB No. 47

October 15, 1983

OPPOSITION
BRIEF

(3)

Supreme Court, U.S.
FILED
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No. 88-1260

In the Supreme Court
OF THE
United States

October Term, 1988

Citibank, N.A.,
Petitioner,
vs.
Wells Fargo Asia Limited,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 88-1260

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OCTOBER TERM, 1988

CITIBANK, N.A.,
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VS.

WELLS FARGO ASIA LIMITED,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION[1]

Citibank describes a case of "first impression," allegedly at odds with federal policies, and supposedly significant in international banking. But this case should ultimately be viewed, as it was by the trial and appellate courts, as a fairly ordinary breach of contract case. Citibank's strained attempt to cultivate interest in its case should be rejected because it relies almost exclusively on broad legal principles, never reached by the courts below, which mask what is essentially Citibank's dissatisfaction with factfinding directed to the contract issues actually decided. Citibank had its day in court, and lost twice.

In contrast to Citibank's inflated claims, the trial court actually decided that: (1) there was a specific contractual agreement by the parties that WFAL's deposits with Citibank were payable in New York in U.S. dollars; (2) under Philippine law nothing prevented Citibank from repaying the deposits in full as long as it

[1] Wells Fargo & Company is the parent of respondent. Its stock is publicly traded. The only arguable subsidiaries or affiliates whose stock may be publicly held are Shanghai Commercial Bank, Harpur Holdings, Ltd., and WF Mortgage & Equity Trust.

did not liquidate loans made by its Manila branch to Philippine nationals; and (3) there was no custom or practice in international banking that limited repayment of an interbank deposit to the funds available at the particular branch where the deposits were booked for accounting purposes. On these issues, Citibank trotted out its witnesses, presented its evidence, made its best arguments, and came up short.

On appeal, the Second Circuit affirmed, focusing upon the first issue: was there a specific contractual agreement by the parties that the deposits were repayable in New York? Thus Philippine law was irrelevant. The appellate court decided the case on that narrow issue and not on any far-reaching principle presenting global repercussions. This the court *itself* said. App. 8a.[2] Undaunted, Citibank's petition seeks to conjure up a ruling that requires all banks holding U.S. dollar deposits abroad to repay even if the deposits are seized or frozen by a foreign government. Pet., p. 2. If those were the facts of this case, then perhaps issues bordering along the "cornerstones of modern international banking" might be presented. Pet., p. 2. But given what was actually decided below, most of Citibank's petition is a lot of smoke without any fire.

On this score, Citibank terms the contractual documentation prepared by it and its brokers as describing mere "wire transfer of funds" or "clearing." Pet., p. 14. No amount of linguistic gymnastics changes the fact that, under these documents, money changes hands in New York. If Citibank thought that it was making some other arrangement, it could have easily said so, as the trial judge himself commented. *See* Jt. App. 532-33. Instead of being specific, Citibank induced depositors to place funds at interest rates favorable to it by making it appear that Citibank, N.A. would repay. And Citibank persists, even in this Court, in using terms like "Citibank/Manila," though the obligor and petitioner is Citibank, N.A.

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[2] "App." refers to the Appendix to the Petition, and "Pet." to the Petition itself. References to "Jt. App." are to the Joint Appendix before the Second Circuit. Citations to "Tr." are to the trial transcript. In each instance, page numbers follow.

In short, once this case is accurately described, there is nothing for this Court to review. This Court does not sit to review factfinding or legal conclusions based upon the laws of New York or the Philippines. Nor should this Court accept Citibank's invitation to create new federal law which would then be applied retroactively to these 1983 deposit contracts. No federal policy or principle requires reversal of the judgment in this action. More than that, no policy or principle governing the jurisdiction of this Court calls for a revisitation of the issues decided at trial by District Judge Knapp, and unanimously affirmed by Judge Kearse's opinion for the Second Circuit.

STATEMENT OF THE CASE

In June of 1983, Wells Fargo Asia Ltd. ("WFAL") placed two U.S. dollar denominated time deposits with Citibank, N.A. The funds for the deposits were paid to Citibank in New York, and Citibank expressly agreed to repay those funds to WFAL in New York. The deposits were booked at Citibank's Manila branch. App. 15a-16a.

Before the deposits matured, the Philippine government adopted a debt repayment moratorium designed to restrict the flow of U.S. currency out of the Philippines (the "Decree"). Despite Citibank's broad statement, there is no dispute concerning the limited breadth of the Decree. The Decree does not expropriate or seize the deposits. Repayment is not prohibited inside or outside of the Philippines. Rather, the Decree only restricts Citibank's ability to use certain funds for repayment. App. 32a-34a.

Citibank refused to repay WFAL in New York. Citibank initially took the position that the Decree completely prohibited repayment of the deposits. WFAL sought clarification concerning the breadth of the Decree from the Philippine Central Bank. The Central Bank, which issued the Decree, confirmed that Citibank could lawfully repay the deposits as long as it did not liquidate loans it had made to Philippine borrowers through its Manila

branch. App. 35a. Citibank retreated.[3] It argued that an unstated term should be implied in the deposits from international banking customs. At the five-day court trial below, Citibank attempted to prove a "custom and practice" that the depositor could look only to the liquid assets of its Manila branch for repayment. According to Citibank, this hypothesized "custom and practice" implicitly qualified its otherwise unconditional promise to repay the deposits. App. 50a. But the district court found as a fact that no such custom or practice existed. App. 35a-36a.

In addition to this finding, the district judge looked to New York and Philippine contract law and determined that, absent a specific agreement, WFAL's right to be repaid its deposits was not conditioned upon Citibank's access to particular assets in Manila. App. 24a, 35a.

There was ample evidence in support of the trial court's judgment. The trial judge found that the interest rate paid by Citibank on deposits in Manila was the same as that paid at less risky locations such as London. App. 36a. Expert witnesses called by both Citibank and WFAL testified that the 10% interest paid to WFAL on these deposits did not include any premium for sovereign risk. (Jt. App. 280 (Dufey); Jt. App. 420-21 (Giddy)). Citibank "must have known that its depositors were not taking any sovereign risk, or didn't think they were." (Jt. App. 530 (comments of Judge Knapp); *see also* Tr. 829-830). As the trial court later added, Citibank "jealously guarded—almost like a trade secret—its belief that everybody was taking sovereign risk." (Jt. App. 532; *see also* Jt. App. 391 (Buenaventura); Tr. 487-89 (Howard); Tr. 388 (Schmidt)). When Citibank finally did inform its depositors of its position after the Decree was imposed,

[3] If the Philippine Decree had been different, so, too, might have been the result. For example, if the Decree had seized WFAL's deposit, or otherwise prohibited Citibank from repaying with its other assets, the case would have taken on a different complexion. But the Philippine govenment took no such action here.

they reacted, in Judge Knapp's words, with "outrage and despair." (Tr. 990).[4]

The Second Circuit affirmed. The court of appeals initially remanded the case, and asked the trial judge for an additional finding of fact. He thereupon determined that the deposits were by specific agreement of the parties to be repaid in New York. App. 26a. Looking to Philippine law, the court of appeals concluded that the Philippine Decree "ha[d] no effect on [Citibank's] obligation to perform acts outside the Philippines" (App. 7a). Turning then to state law, the court concluded that Citibank was liable for its failure to pay in New York. Thus the holding was based entirely on a finding of fact and application of foreign and state law.

REASONS FOR DENYING THE WRIT

Since Philippine independence and the demise of *Swift v. Tyson* (16 Pet. 1 (1842)), this Court does not sit in review of rulings of New York or Philippine law. So Citibank seeks to create a jurisdictional basis for review, asserting that,

> " *** federal statutes and regulations establish the principle that U.S. banks are not responsible for the actions of foreign sovereigns . . . [having cited 12 U.S.C. § 461(b)(6) (1982) and Fed. Reg. 2768 (1970)]." Trinh Pet., p. 12, n.10.

But, in truth, federal statutes and regulations neither do nor attempt to do any such thing.[5] Citibank's obligations in this case are not established in or limited by "federal law." They are

[4] If Citibank's depositors thought they were assuming such risk, they would not have placed deposits with Citibank at branches in risky locations without demanding a substantial premium interest rate. (*See* Jt. App. 298-300 (Wood)). It is a misstatement to suggest that interbank depositors *chose* Manila by "taking into account the political and economic risks of depositing" funds there. *See* Pet., p. 5.

[5] The authorities cited by Citibank in its petition consist entirely of (i) amicus briefs or letters directed to the Second Circuit before decision by that court (Pet., pp. 10, 11, 13, 14), and (ii) a handful of statutes and administrative pronouncements reprinted in the Appendix.

governed by the state and foreign law which has animated decision throughout this litigation.

I. THIS IS A CONTRACT CASE, CORRECTLY RESOLVED UNDER EXISTING LAW

Interbank deposits are contracts. These deposit contracts contain no express term rendering the promise to repay WFAL dependent upon assets being available to Citibank in Manila. Instead, Citibank, N.A. unconditionally promised to repay WFAL, in New York, upon maturity of the deposits. Citibank set out *but failed* to prove a different agreement: that repayment of the interbank deposits was implicitly conditioned upon Citibank's access to assets booked at the Manila branch. In the absence of such a differing agreement, a bank deposit is not a bailment. The depositor looks to the bank, and all of its resources, for repayment at maturity.

This is not new law. It was recognized by Judge Cardozo in *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), and has been followed in an unbroken line of decisions.[6] As Judge Cardozo wrote in *Sokoloff*, by reference to the facts there (involving petitioner):

> "Plaintiff did not pay his money to the defendant [bank], and become the owner of this chose in action, upon the security of the Russian assets. He paid his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere. Everything in Russia might have been destroyed by fire or flood, by war or revolution, and still the defendant would have remained bound by its engagement." 239 N.Y. 158, at 167, 145 N.E. 917 (1924).

Neither create "federal law" governing the liability of banks to their depositors. *See* Section IIA, *post*.

[6] *See, e.g., Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6 Cir. 1988); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2 Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984).

The same is true as a matter of Philippine contract law, as Judge Knapp found. App. 32a-33a.

Citibank confuses the issue by referring repeatedly to the "situs" of the deposits, as if the intangible "location" of the deposits somehow limits the scope of its obligation under the deposit contracts.[7] But the place for "payment," "collection," "clearing," "demand," or otherwise, has no modifying effect upon the extent of the promise made to repay. Illiquidity at a branch does not extinguish the institutional promise to repay with funds elsewhere. Such extinguishment occurs only if the promise to repay *at* a particular branch is also a promise to repay only *with* assets situated or booked there. Such a limited undertaking by a bank is unusual and must be specifically proved. It was never proved in this case.

Now, sovereign action at a branch will sometimes terminate the depositor's right to be paid. For example, if the sovereign expropriates the depositor's account, the depositor's money has been taken, and the bank is certainly not required to pay twice. *Perez v. Chase Manhattan Bank, supra*. But the sovereign in these circumstances steps into the shoes of the depositor. The payments are made for the account of the depositor, as is the case under a garnishment or levy. But these principles have no application to this case. Citibank has not paid or transferred WFAL's money to any sovereign. The Decree does not prevent repayment. The Decree does not seize or freeze the deposits. The Decree merely limits Citibank's ability to liquidate certain loans made in the Philippines. App. 35a. The trial court specifically limited its holding to this situation. App. 37a; *compare* App. 21a-22a.

The court of appeals examined the "situs" of the deposits only to determine that, if the deposits are payable in New York, the Philippine Decree becomes completely irrelevant to this case. Nevertheless, Citibank complains that the district judge's finding of "payment" in New York refers only to the place of *transfer* of

[7] The "location" of deposits may be relevant for resolving choice of law issues. It is not significant to any issue in this case. The trial court specifically concluded that WFAL would prevail under either Philippine or New York law. *Compare* App. 24a *with* App. 35a.

funds and not to the *assets to be used to pay* or the place where WFAL could "collect" the money upon a default in payment. App. 14-15. These supposed distinctions are irrelevant. Citibank is correct in urging that the district court discerned a distinction between the two concepts. Citibank fails to acknowledge, however, that the same court specifically considered the assets WFAL could look to for repayment. App. 21a, 35a. And, as the court of appeals observed, a promise to pay at a particular place carries with it a presumption that the assets available to the bank at that place may be mustered unless the deposit contract expressly imposes some lesser obligation on the bank. App. 8a. Any failure of proof thus works against Citibank, not WFAL.[8]

Nothing about the judgment in this case upsets the existing interbank market or distorts out of proper proportion the agreement here concerning payment in New York. As the district judge found, the interbank market which creates and generates these telexes and confirmations has no preconception that only branch assets may be summoned to satisfy a deposit. App. 17a. This market has functioned under an existing scheme of contract law which, absent an agreement, does not confine a depositor to satisfaction from the assets of a branch. Unless a branch restriction is specified, there is no custom, practice, or presumption that such a limitation exists. The judgment in this case is a product of Citibank's failure to prove that it agreed with WFAL to such a limited undertaking. App. 8a.

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[8] The judgment in this case does not render all deposits *"ipso facto"* payable in New York. It does not confuse the "clearing" of a deposit with a "payment." *Compare* Pet., p. 16 *with* Amicus Brief, N.Y. Clearing House Ass'n, p. 6. The finding of "payable" in New York was based upon an explicit contract term proved at a five-day court trial. The Second Circuit has already demonstrated its ability to distinguish situations in which "clearing" occurs in New York though "payment" takes place elsewhere. *Braka v. Bancomer,* S.N.C., 762 F.2d 222 (2 Cir. 1985). *See also Callejo v. Bancomer,* S.A., 764 F.2d 1101 (5 Cir. 1985). The Second Circuit also denied rehearing *en banc* in this case despite Citibank's assertion of conflict with *Braka* on the matter of "clearing."

II. THERE IS NO BASIS OR AUTHORITY FOR COURT-INITIATED DRAFTING OF FEDERAL LAW IN THIS FIELD

In search of something on which to predicate a petition for certiorari, Citibank premiers the argument that this Court should take this occcasion to fashion a uniform rule of federal law supplanting the contract law principles which have reigned in this field for decades.[9] There is no merit to the argument, and there are persuasive reasons why this Court should not entertain it.

Congress knows how to occupy a field and displace local law. A few days ago, in *Northwest Central Pipeline Corp. v. State Corporation Comm'n,* ____ U.S.____, 57 U.S. Law Week 4302, 4306 (March 6, 1989), this Court unanimously reiterated:

> "In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)."

None of these indicia necessary for preemption can be found in this case.

A. Existing Federal Law

The absence of governing federal law is proved up by the petition itself, which asks *this Court* to create such law. *See* Pet.,

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[9] This argument for "federal common law" is a glittering plea for result-oriented jurisprudence. Citibank urged both district and circuit courts to look to Philippine law in this case. App. 13a & n.1. This is not a *nisi prius* court. Citibank invited the result about which it complains, for it sought and got a decision under non-federal principles.

p. 12 & n.6. If the deed had already been done, the petition would not ask for it to be done now and here.

Quoting the amicus brief below, Citibank states: "U.S. banking policies . . . *presume* that, unless agreed otherwise by the parties, depositors bear the sovereign risk . . . "; and that this derives from "Congressional, Federal Reserve Board and FDIC *understanding* . . . " *See* Pet., p. 11, quoting U.S. Am. Br. at pp. 19-20 (emphasis added). In the same vein, Citibank argues that "it had never been thought" and "federal regulators have never regarded" interbank specifications for payment in New York as indicative that assets in New York might be used to satisfy interbank deposits booked at branches elsewhere. Pet., p. 14. More of the same is found in Citibank's quotations from the amicus letter and brief in the court of appeals, *see* Pet., p. 13, and in assumptions set forth in a Federal Register excerpt, 35 Fed. Reg. 2768 (1970) (reprinted at App. 61a).[10]

These statements do not purport to establish the legal relationship banks have with depositors. These relationships are traditional subjects of state law. The treatise "Banking Law" by Schlichting, Rice, and Cooper, Vol. 1, § 1.07[1] (Bender 1988) explains the proper role of state law, by quotation of this Court's decision in *First Nat'l Bank of Louisville v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870):

> "Federal legislation does not provide for a comprehensive legal scheme for the whole country, and local laws on many matters are necessarily applicable to national banks. The Supreme Court has summarized the position of national banks as follows:

[10] The assumption underlying the Federal Register reference is accurate only in part. Offshore depositors are exposed to some sovereign risks not shared by their domestic counterparts. For example, a foreign government seizure of a deposit may preclude collection at other branches. *Perez v. Chase Manhattan Bank, supra.* But these situations do not demonstrate a universal principle suitable to every imaginable set of facts, as Citibank now claims.

> " 'They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' "

On the particular subject in this case, the Federal Reserve, by reference to state law principles, has expressed views incompatible with those which Citibank now offers. *See* 1917 Fed.Res.Bull. 198 (Feb. 8, 1917) (a foreign branch established by a national bank is not an independent corporation, and the creditors of the bank are general creditors of the parent bank).

While there are certain regulatory distinctions drawn in federal law between domestic and foreign booked deposits, none speaks, directly or by implication, to the assets to be used for repayment of foreign branch deposits.

For example, in 1918, the Federal Reserve announced that reserves were not required for deposits booked at foreign branches. It concluded that a bank is the ultimate obligor of branch deposits, though branches may in some ways be subject to local law.

> "The first question to be determined is whether this [reserve] requirement applies to deposits received in foreign branches of a member bank. It is true that there is no separate corporate entity as between the parent bank and its branch. A deposit liability of a branch is, therefore, a liability of the parent bank, and if section 19 is interpreted literally the language is no doubt broad enough to cover deposits received in foreign countries through branches." 1918 Fed. Res. Bull. 1123 (Nov. 1, 1918).

Even now, Citibank concedes that, whatever reserves it has or has not posted, it can be required in most circumstances to repay in the United States whenever a foreign branch is illiquid. Pet., p. 9 n.5; App. 31a.

B. This Court Should Not Legislate Changes in the Law

Federal courts have only a limited province to supplant state law with federal principles drafted by the judiciary. Citibank has failed to cross the threshold necessary to invoke this limited judicial power in this case.

This Court creates federal common law only in "a few areas, involving 'uniquely federal interests.'" *Boyle v. United Technologies Corp.*, ___ U.S. ___, 108 S.Ct. 2510, 2514 (1988), *quoting Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). These "few and restricted areas," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963),

> "are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Boyle, supra*, 108 S.Ct. at 2504.

The "guiding principle" remains, as Justice Harlan wrote for the Court in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966):

> "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total *corpus juris* of the states . . .' Hart & Wechsler, The Federal Courts and the Federal System 435 (1953)."

Institution-wide bank liability for foreign branch deposits was recognized by the Federal Reserve in 1917[11] and has been enforced by the courts since *Sokoloff* in 1924. In the intervening years, despite recurring instances of such liability,[12] neither Congress nor bank regulatory agencies have taken action. If existing rules of law posed dangers to the nation, surely some legislative reform would have bubbled to the surface.

There is nothing "uniquely federal" about banking. To be sure, the government has an interest in the banking industry. But generalized federal interest in a field is insufficient to provoke federal common law. *See Miree v. De Kalb County*, 433 U.S. 25, 31 (1977). The United States has never occupied the banking field or indicated that uniform federal law is necessary to serve its interests. A dual system of state *and* federal regulation, rather than uniform national rules, has been the order of the day in banking, absent particularized preemption. In particular, the legal relationships between national banks and those with whom they deal are governed by state law, except as the federal law provides otherwise. *Ante*, pp. 10-11.

This scheme makes it perilous at best for the judiciary to infer any preemption in a field where Congress does not merely legislate "against the background of the total *corpus juris* of the states," *Wallis, supra*, but in fact defers to the regulatory power and law of the states, absent particular preemption.

This leaves for consideration the peculiar regulatory interests of the United States posed by the facts of this case. As to these, the decision in this case is not "an obstacle to the accomplishment and execution of congressional objectives . . ." thereby necessitating federal uniformity or preemption. *Northwest Central Pipeline Corp., supra*. Whatever federal interests lie in the administration of reserve or insurance programs applicable to national banks, they are not at risk by the judgment in this case.[13] And, of course,

[11] 1917 Fed. Res. Bull. 198 (Feb. 8, 1917).

[12] *See* note 6 and companion text, *ante*.

[13] Much of the federal regulation of banks is based upon the existence of nationally chartered banks. But this source of federal authority could

the federal government has *no* interest in the particular deposit contracts at issue here. Purely private contract disputes, of which this case is an illustration, do not ordinarily call for application of federal common law. *Bank of America, N.T. & S.A. v. Parnell*, 352 U.S. 29, 33, 34 (1956).[14] No federal interest would be served by relieving Citibank from a contract-based liability to unconditionally repay which it assumed under a longstanding regime of state law.

Congress is the lawmaker to which Citibank's "policy" arguments should be addressed. A rule restricting repayment based upon local assets would be a departure from prior principles. It is by no means obvious that U.S. policies are best served by fastening onto an international banking market a new, unsolicited body of U.S. federal law. More in point, this Court is ill-equipped to make the policy judgments which are implicated by Citibank's proposed rule. The international implications should be settled by the Executive Branch. *See C&S Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948). The weighing of domestic and regulatory considerations falls within Congress' special province. As explained in United States v. Gilman, 347 U.S. 507, 511-13 (1954):

> "The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them."

hardly be the basis for Citibank's proposed rules of federal common law. A federal rule of law promulgated under federal authority to regulate nationally chartered banks would not produce any uniformity. For example, many of the ten members of the Clearing House, appearing as amicus in this Court, are not nationally chartered and would not, therefore, be subject to a rule adopted as part of a system regulating national banks.

[14] Most cases of court-created federal common law involve instances in which the United States is directly interested in the litigation in which the law is announced. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

In matters such as this, this Court properly defers to the superior lawmaking abilities of other branches. *Bush v. Lucas*, 462 U.S. 367, 390 (1983). So it should here, for reasons of institutional competence.

In addition, Citibank is asking this Court to intervene in a market whose economic nature is such as to drain all significance from this case. The interbank market permits deposits in the secure financial capitals of the world. When Citibank refused to pay its interbank depositors in the Philippines, it very forcefully put the participants in the market on notice of its position. There is nothing in the record suggesting that banks have, nevertheless, continued to place interbank deposits with Citibank in risky countries at interest rates no different than those available in safer locations. So, if Citibank were to win this case, it would only have succeeded in shifting to one small group of depositors risks which they never agreed to assume, and which Citibank never paid them to assume by way of an interest premium. As a purely retrospective matter, Citibank would have succeeded in reaping high returns from lending and investing in risky countries, while hedging its exposure with deposits which laid off the risk of adverse foreign government action on depositors.

Finally, the great curiosity in Citibank's approach to this case is the rule of federal law which it proposes. Ultimately, it wishes to define its duties to depositors by contract. Pet., p. 9. Yet that is exactly what happens under the existing legal regime. And so the only real change will be to grant Citibank (at WFAL's expense) reformation of this contract, made in the past, and leave the slate clean for whatever Citibank is willing to agree upon henceforth. This again underscores that it is not really change or uniformity which the petition seeks. Instead, it seeks a particular result confined in importance to this particular past contract.

III. PRUDENTIAL REASONS ALSO EXIST FOR DENIAL OF CERTIORARI

If there is mischief arising from the judgment here, Citibank can correct things unilaterally. By electing to do business through branches, rather than through locally incorporated banks, Citibank conveys to depositors the idea that they are doing business

with a large, well-known bank of great stature and dependability. Citibank preferred not to clarify its own views of its liability by disclosure. (Jt. App. 532 (per Judge Knapp)). It was to be expected that a method of doing business which confused customers about the extent of Citibank's commitment to repay would cause litigation and expose Citibank to the risk that its privately held views might not be accepted as deposit contract terms.

Citibank argues that it cannot satisfactorily limit liability for branch deposits by clearly expressing such limitations in future deposit contracts. In this and other cases, the courts have thought otherwise. Here the trial judge observed at the close of the trial (Jt. App. 532-33):

> "Although it is not for me to practice law and tell you how to do things, it seems to me that it would be a dead cinch, you are dealing with a very small number of people, small number of banks, small number of brokers, and it seems to me that it would be a dead cinch for Citibank to publish their views in such a way that no one in that small community could realistically say he wasn't aware of it when making a deposit."

Needless to add, Citibank never demonstrated to the trier of fact the "impossibility" or difficulty of explaining its views to depositors. Citibank's own expert witness testified that clearer contractual documentation could be drafted by Citibank. Jt. App. 427-28 (Giddy). It is presumptuous in the extreme to assume that courts would not enforce forthright disclaimers at such time as Citibank attempts them.

It is said that candid disclosure in the fashion suggested by at least two courts "would immediately result in a substantial competitive disadvantage" to Citibank. Pet., p.19. It seems a curious use of this Court's writ of certiorari to preserve an ambiguous method of doing business which causes depositors to place substantial sums at interest rates, and upon terms, which the depositors would reject in an environment of full disclosure.[15] In any event, the claim of disadvantage is predicated upon the

[15] *See* note 4 and paragraph of companion text, *ante*.

pure speculation that other deposit-taking banks also view branch deposits as tied to branch assets. The evidence at trial failed to show that Citibank's method of doing business is conventional, customary or necessary to preserve competition.

CONCLUSION

Certiorari should be denied.

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REPLY BRIEF

No. 88-1260 (4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITIBANK, N.A.,
Petitioner,

v.

WELLS FARGO ASIA LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

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1. Respondent characterizes this case as a "fairly ordinary breach of contract" dispute, in which the U.S. banking system and federal government have "no interest." Br. in Opp. 1, 2, 13-14. This characterization is squarely contrary to the repeated statements of the Federal Reserve Board, the Department of the Treasury, the Department of State, the Department of Justice, other U.S. government agencies, and trade organizations representing hundreds of U.S. banks. All these groups have expressed their powerful concern about the resolution of this case and its effect on the U.S. banking system.

Nor do the facts of this case suggest an ordinary contract dispute. The case arose when a Singapore bank placed dollar deposits in the Philippine branch of a U.S. bank in order to obtain higher interest rates than would have been available in the United States. The Philippine government then froze the dollar assets of the Philippine branch, thereby preventing it from repaying the deposits made with it.[1] The case thus presents the question whether the Singapore bank or the U.S. bank—and, ultimately, the U.S. banking system—should bear whatever risk of loss accompanies this freeze order.

The Second Circuit accepted the general principle urged by Citibank and the United States. The court held, contrary to the Sixth Circuit in *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), that, absent an express agreement to the contrary, foreign branch depositors bear the risk of foreign sovereign interference with the branch's ability to repay deposits.[2] The court of appeals

[1] Respondent suggests that the imposition of exchange controls or asset freezes, like those in this case, occurs only infrequently in a small group of risky developing nations. Br. in Opp. at 15. In fact, exchange controls and other sovereign payment restrictions have recently been imposed with increasing frequency and, of course, have not been limited to developing nations. *See* Testimony of Dr. Gunter Dufey, Tr. 712-13.

[2] *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657, 660-61 (2d Cir. 1988) (App. at 6a, 8a). Respondent obliquely suggests, but

nevertheless found Citibank liable because it inferred from routing instructions referring to New York that Citibank had agreed to an exception to this general principle. App. at 14a-17a, 19a.

In its petition, Citibank demonstrated that the routing instructions used were standard for Eurodollar interbank placements. Such routing instructions arise out of the practical necessity to clear transfers of Eurodollar funds through the New York clearing system. The foundation of that clearing system is the maintenance of sizeable accounts by each of the clearing banks at the Federal Reserve Bank of New York, which accounts are debited or credited in ultimate reconciliation of the amounts owed by the clearing banks to one another. The integrity of the U.S. dollar clearing is supported by the Federal Reserve's authority to provide emergency credit to each of the clearing banks. By its decision, the court of appeals has made all Eurodollar obligations of a U.S. bank collectible out of its worldwide assets of a U.S. bank whenever a foreign government prevents a foreign branch from repaying.[3] Respondent does not deny this result or its significance, and indeed concedes that, if Citibank has correctly characterized the facts at issue, this case is of major importance for international banking.[4]

nowhere argues, that Citibank's federal common law and preemption arguments were not raised below. Br. in Opp. at 1, 9 & n.9. Citibank expressly and repeatedly presented its federal law arguments in the courts below, and the U.S. government as *amicus curiae* explicitly advanced its own federal law arguments. Indeed, one of only two questions presented by Citibank on appeal stated: "should a U.S. court enforce [foreign] law when that law *would violate U.S. law and policy?*" *See* Brief of Citibank on Appeal at 4, 31-42 *Wells Fargo, supra* (No. 87-7685) (emphasis added).

[3] Brief of the New York Clearing House Association and the Institute of International Bankers as Amici Curiae in Support of Pet. for Cert. at 7-8, *Wells Fargo, supra*, No. 88-1260 (U.S. filed Feb. 24, 1989). Respondent does not take issue with Citibank's explanation that routing instructions similar to those used here are virtually inevitable in Eurodollar interbank placements.

[4] Br. in Opp. at 2. Respondent attempts to limit the significance of this case by asserting that Citibank somehow agreed to be liable

In opposing certiorari, respondent does not defend the rule of the court below. Instead, respondent asserts a much broader rule that whenever a foreign sovereign interferes with a foreign branch, the foreign branch depositor can "look[] to the bank, and all of its resources, for repayment at maturity" (Br. in Opp. at 6) and that the U.S. bank must "specifically prove[] any limitation on "the institutional promise to repay with funds elsewhere." *Id.* at 7. Respondent thus suggests that all deposits made with foreign branches of U.S. banks—regardless of their routing, the currency in which they are denominated, or anything else—must be repaid in the United States despite foreign sovereign interference unless the U.S. bank can "specifically prove" that it has limited its obligation. This is exactly the opposite approach from that of the Second Circuit: The U.S. bank is normally required to pay "only at the relevant branch" unless there has been a "variation by agreement of the parties." App. at 6a; Pet. for Cert. at 9, 11-12.[5]

in these circumstances. Nothing in the record or in the decisions below supports any such assertion. Indeed, the trial court found to the contrary. App. at 14a. The Second Circuit's ruling as to the parties' "agreement" was based on nothing more than standard routing instructions, with the court holding as a matter of law that such language would be treated as an agreement for repayment in New York whenever a foreign sovereign interferes with the branch primarily liable for the deposit. Moreover, respondent nowhere questions the fact that the Second Circuit did not purport to find a guarantee or other "express contractual commitment" by Citibank to repay at its home office. Pet. for Cert. at 13-14.

[5] Respondent would shield U.S. banks from liability only where the foreign sovereign has explicitly "expropriated" the deposit itself, rather than expropriating the branch or freezing its assets. Br. in Opp. at 7. Respondent's approach, which rests on the *federal* act of state doctrine applied in *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984), is a telling acknowledgment of the peculiarly federal character of this case. There is, however, no sensible rationale for a rule that would permit foreign sovereigns, simply by varying the language of their decrees, to determine unilaterally the extent to which the U.S. banking system is liable for the sovereigns' acts.

The ramifications of either the respondent's or the Second Circuit's rule are severe. The potential liabilities for U.S. banks reach well into the billions of dollars. If finally adopted, either rule would require a fundamental review of the U.S. approach to regulation of foreign branches, which rests on the essential premise that deposits made abroad are payable there and therefore are neither subject to U.S. regulation nor directly supported by the federal safety net. The effect would be to transform our international banking markets in ways as yet unforeseen. These are not results that one would expect from a "fairly ordinary contract case."

2. Respondent argues that neither federal preemption analysis (Br. in Opp. at 9-11) nor federal common law principles (Br. in Opp. at 12-15) support a federal rule of decision in this case. But respondent reaches this conclusion only by ignoring the fundamental distinction between domestic and international banking activities, the contradiction of the court's decision with federal law and policy, and the federal authorities that bear on the case. Each of these supports a narrowly-tailored federal rule of decision governing the allocation of foreign sovereign risk under both federal common law principles and closely-related federal preemption analysis.

a. *Uniquely Federal Area.* This case—arising from a deposit placed in Citibank's Manila branch by Singapore money brokers acting on behalf of a Singapore bank and later frozen by exchange controls imposed by a foreign sovereign—involves an extensively regulated field of U.S. foreign commerce and implicates important foreign relations interests. This Court has repeatedly said that the Nation's foreign commerce [6] and foreign relations [7]

[6] *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). It is well-settled that both affirmative and dormant federal authority over foreign commerce is more extensive than over interstate commerce. *Id.* at 448, 451.

[7] *See Zschernig v. Miller*, 389 U.S. 429 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

are of uniquely federal concern and subject to peculiarly broad federal control. As the government repeatedly emphasized below and in *Trinh*, the United States has vital foreign relations and foreign commerce interests in these cases, including (a) providing a U.S. bank presence abroad; (b) developing U.S. trade and investment outside the United States; (c) using foreign branches to act as fiscal agents of the U.S. government; (d) negotiating international arrangements for dealing with private property disputes through federal claims commissions and preventing judicial decisions inconsistent with those arrangements; [8] and (e) avoiding foreign government seizure of U.S. bank assets with the expectation that the U.S. banking system will be forced to compensate depositors and thereby backstop the foreign sovereign's action. U.S. Am. Br. at 33-34, *Trinh, supra.* For its part, respondent appears to rely upon the fact that some banking activities are subject to state law and regulation.[9] As explained in its Reply Brief in *Trinh* (at 7 & n.11), Citibank does not question the application of state law to many activities of foreign branches of U.S. banks. But respondent ignores the fact that it is Congress and the Federal Reserve Board that authorize foreign branches, encourage such branches, and regulate foreign branch operations. Because, as described below, federal statutes and regulations have addressed the precise issue raised by this case, state law must yield to federal law and policy insofar as the two conflict.

[8] Brief for the United States as Amicus Curiae at 16-17 & 29-30, *Trinh, supra* (No. 86-1258); Brief for the United States as Amicus Curiae at 13-15, *Wells Fargo, supra.*

[9] Respondent's principal effort to denigrate the federal interests at stake here is based on a single nineteenth century, domestic case involving neither foreign relations nor foreign commerce concerns. *First Nat'l Bank of Louisville v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870); Br. in Opp. at 10-11, 13. Respondent is also demonstrably wrong when it suggests (Br. in Opp. at 13-14 n.13), that state-chartered banks are not subject to the federal regulatory provisions regarding reserves and FDIC insurance.

b. *Conflict With Federal Law and Policy.* Respondent argues that no finding of preemption or application of federal common law is permitted because Citibank has not shown that "the state law at issue conflicts with federal law" or that "state law stands as an obstacle to the accomplishment and execution of congressional objectives." (Br. in Opp. at 9, quoting *Northwest Central Pipeline Corp. v. State Corporation Commission*, 57 U.S.L.W. 4302, 4306 (U.S. Mar. 6, 1989)). Respondent rests this claim entirely on two opinions of the Federal Reserve Board, rendered in 1917 and 1918.

Accurately characterized, both opinions *support* Citibank's position. The first opinion deals only with the question of what happens when a U.S. bank fails; it does not purport to deal with the consequences of foreign sovereign interference with branch operations.[10] The second opinion recognized for the first time the different considerations presented by foreign sovereign action with respect to foreign branches and, based on these considerations, exempted foreign branch deposits from domestic reserve requirements. 4 Fed. Res. Bull. 1123 (1918).

The question of "sovereign risk" was expressly dealt with in subsequent, more specific federal pronouncements. In 1970, the Board issued a regulation reaffirming the exemption of deposits payable only abroad from reserve requirements and interest rate limits.[11] This time the Board was even more specific in its decision that, in cases of foreign sovereign interference, depositors with the foreign branches of U.S. banks normally should not

[10] Citibank has consistently maintained that it will bear responsibility for the deposit obligations of its foreign branches in the absence of foreign sovereign interference. Pet. for Cert. at 9 n.5; App. at 31a, 43a. This is also the position of the U.S. government. U.S. Am. Br. at 16-17, *Wells Fargo, supra.*

[11] 35 Fed. Reg. 2768 (1970) (App. at 61a-62a). The same distinction between foreign deposits and domestic deposits applies in the deposit insurance context, where foreign deposits are exempted from Federal Deposit Insurance Corporation assessments and protection. 12 U.S.C. § 1813(*l*)(5)(A) (1982) (App. at 59a-60a).

be entitled to payment at the bank's domestic offices: "A customer who makes a deposit that is payable solely at a foreign branch *assumes whatever risk may exist that the foreign government might impose restrictions on withdrawals.*" 35 Fed. Reg. 2768 (1970) (App. at 61a-62a) (emphasis added).

In issuing this regulation, the Board could not, as respondent contends (Br. in Opp. at 10 & n.10), have been merely making an assumption about the effect of foreign or state laws—which would vary widely and could not be described in a single, uniform formula. The Board's 1970 regulation was based on Congress' objective of enabling the "foreign branches of U.S. banks to compete on a more nearly equal basis with [foreign banks]" (App. at 61a-62a), as well as upon the federal policies of encouraging foreign branching and ensuring that "the interests of the parent bank [are] safeguarded and the creditors in this country [are] protected." 4 Fed. Res. Bull. 1123 (1918). These considerations, the Board concluded, require that the risk of sovereign interference with foreign deposits be allocated to foreign depositors—not to U.S. banks.[12] Congress subsequently codified this allocation of sovereign risk in 1980 by specifically exempting "deposits payable only outside the . . . United States" from reserve requirements, and did so for the express purpose of continuing existing administrative practice.[13]

[12] Indeed, it would be remarkable if Congress and the Board intended to permit foreign or state governments to decide unilaterally whether foreign depositors can draw on the domestic U.S. banking system when U.S. banks' foreign branches cannot repay deposits because of foreign sovereign action. When Congress and the Board expressly created two separate regulatory categories—domestic and foreign deposits—they scarcely could have intended to permit foreign or state law freely to nullify this distinction and require that all deposits be treated identically.

[13] 12 U.S.C. § 461(b)(6) (1982) (App. at 57a); H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979). Federal regulations have never treated the routing instructions routinely used in Eurodollar deposits as eliminating the regulatory distinction between foreign and domestic deposits.

Holding Citibank liable in the present case would be directly contrary to this federal allocation of foreign sovereign risk. Respondent's Brief in Opposition graphically illustrates this conflict when it baldly asserts that the Federal Reserve Board's "assumption [of no home office liability for foreign sovereign interference] underlying the [1970] Federal Register reference *is accurate only in part*." Br. in Opp. at 10 n.10 (emphasis added). Although respondent is correct that its views are irreconcilable with the Board's 1970 regulation, it is not the Federal Reserve Board that is mistaken about the meaning and effect of its own pronouncements. Rather, it is respondent that is unwilling to acknowledge that the Board's regulatory practice and regulations and Congress' later statute clearly and specifically address the allocation of foreign sovereign risk.[14]

3. Respondent suggests that interest rates in the Philippines did not include any premium for foreign sovereign risk and insinuates that Citibank is therefore trying to gain an advantage for which it did not pay. Br. in Opp. at 4-5 & n.4, 15-16. What respondent fails to explain, however, is that foreign deposits—including those made by respondent here—bear higher interest rates than do domestic deposits and that this interest rate differential reflects the very regulatory distinction between domestic and foreign deposits that respondent now seeks to ignore.[15] Respondent has been paid a premium for choosing to place its funds in a banking system

[14] Ironically, respondent contends that Citibank has requested the Court to "make" a new rule of federal law. Br. in Opp. at 9-10, 14-15. On the contrary, the petition merely asks this Court to recognize existing federal law and policy. It is respondent and some of the lower courts that have relied on their own notions of consumer protection to fashion a "general banking principle" of home office liability that has no basis in federal law. *Trinh, supra*, 850 F.2d at 1168.

[15] Brief of the New York Clearing House Association as Amicus Curiae at 4-5, *Wells Fargo, supra*; Testimony of Dr. Gunter Dufey, Tr. at 703-05, 729-31; Testimony of Dr. Ian Giddy, Tr. 1027-29, 1032-33.

outside the U.S. regulatory system and now wishes to come within the protection of that system without paying the price.

4. In the face of the importance of the issue and the conflict between the court of appeals' decision and federal law and policy, respondent attempts to assume away the problem by suggesting that Citibank could avoid home office liability for foreign sovereign interference by simply "'publish[ing] their views'" in the banking community. Br. in Opp. at 16 (quoting Joint Appendix at 532-33, *Wells Fargo, supra*). Respondent's suggestion is, of course, motivated by its recognition that the Eurodollar interbank placement market is not documentary and therefore that detailed contract language offers no solution. But whatever public announcements Citibank or others might make, the routing instructions relied upon by the court below—with their reference to "money changing hands in New York" (Br. in Opp. at 2)—will of necessity be included in virtually all future Eurodollar interbank placements. And respondent does not, in any event, attempt to explain how a general announcement made to the world at large[16] (and not in the terms of a specific contract) could affect billions of dollars in outstanding obligations or succeed where written terms in contracts for documented transactions (such as consumer deposits) have failed. As we have shown, the lower courts have created confusion over what contract language, if any, could ensure that foreign sovereign risk remains with foreign depositors. *See* Pet. for Cert. at 15-17, 19-20, *Trinh, supra*.[17] There is no reason to

[16] Respondent suggests that the Eurodollar interbank placement market involves only a small number of participants. In fact, this market consists of a large number of entities located in numerous countries around the world.

[17] Respondent also suggests that Citibank could shield itself from foreign sovereign risk by operating through locally incorporated subsidiaries. As our petition in *Trinh* demonstrated, federal policy has long encouraged foreign branching, and foreign governments go so far as to require U.S. banks to operate through local branches. *Id.* at 20.

believe that Citibank's unilateral disclaimer of liability would succeed in legally binding other parties and so fare better than the explicit contractual provisions that various lower courts have refused to enforce.

CONCLUSION

This is not a "fairly ordinary contract case." It is a case that inadvertently works a fundamental change in the Eurodollar market, the U.S. banking system and federal bank regulation, and the interests of the U.S. government abroad. The petition should be granted.

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AMICUS CURIAE

BRIEF

(5)

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No. 88-1260

In the Supreme Court of the United States

OCTOBER TERM, 1989

CITIBANK, N.A., PETITIONER

v.

WELLS FARGO ASIA LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, contrary to the design of federal banking regulation, a United States bank may be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

2. Whether, contrary to federal banking law and policy, the use of standard instructions to route funds through New York bank accounts of foreign depositors constitutes an agreement by United States banks to be liable for deposits in their foreign branches when the deposits are taken or frozen by foreign governments.

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No. 88-1260

CITIBANK, N.A., PETITIONER

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WELLS FARGO ASIA LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Citibank, N.A. (Citibank) seeks review of a court of appeals' decision holding that Citibank's New York office is obligated to repay two dollar-denominated deposits that respondent Wells Fargo Asia, Ltd. (WFAL) placed with a Citibank branch located in Manila, Republic of the Philippines. The court of appeals concluded that Citibank had agreed to repay the deposits in New York and accordingly rejected Citibank's defense that a Philippine government decree, prohibiting remittance of dollars for repayment of principal on obligations owed to foreign banks, suspended the obligation to repay. See Pet. App. 1a-8a.[1]

[1] Citibank also has filed a petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Sixth Circuit holding that Citibank's New York office is obligated to repay a savings account, denominated in piasters, that a Vietnamese citizen placed with a Citibank branch formerly operated in Saigon, Republic of Vietnam. See *Citibank, N.A.* v. *Trinh*, No. 88-1031. The Solicitor General has filed a seperate brief setting forth the United States' views in that case.

1. Congress has authorized federally chartered national banks, such as Citibank, to establish foreign branches "for the furtherance of the foreign commerce of the United States, and to act if required to do so as the fiscal agents of the United States." See Federal Reserve Act, 12 U.S.C. 601 *et seq.*; 12 C.F.R. Pt. 211. A national bank wishing to establish a foreign branch must seek permission from the Board of Governors of the Federal Reserve System (Federal Reserve Board) to operate the branch "upon such conditions and under such regulations as may be prescribed by the said board" (12 U.S.C. 601). See 12 C.F.R. 211.3(a).[2] A foreign branch of a United States bank is subject, of course, to local laws and regulations that may impose additional restrictions on its operations.[3]

Foreign branches attract funds for lending through various means. They generally compete with local banks for business and individual deposits, accepting savings, time, or demand deposits in local currency, allowing withdrawals, and paying interest in accordance with the terms of deposit agreements. Foreign branches may also accept dollar-denominated deposits, which are commonly known as "Eurodollars."[4] In the case of Eurodollar transactions, the foreign branch may use dollar-denominated deposits to pay off its dollar-denominated obligations, or it may convert dollar-denominated deposits into local currency through the foreign government's central bank, lend the converted funds locally, and then repay the depositor by reconverting local currency into dollars.[5]

[2] The Federal Reserve Board also approves the establishment of foreign branches of state-chartered banks that are members of the Federal Reserve System (12 U.S.C. 321). In addition, the Federal Deposit Insurance Act requires state-chartered banks that are not members of the Federal Reserve System to seek approval from the Federal Deposit Insurance Corporation (FDIC) before establishing foreign branches (12 U.S.C. 1828(d)(2)).

[3] The major industrial nations have formulated general guidelines describing the regulatory responsibilities of the home country and the host country. See Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983). See also *Trinh* Pet. App. 68a-73a (excerpts).

[4] Although European banks originated the practice of accepting dollar-denominated deposits, the term "Eurodollars" describes dollar-denominated deposits payable anywhere outside of the United States. See notes 18-19, *infra*.

[5] Foreign branches generally solicit Eurodollar deposits from financial institutions located throughout the world that seek short-term investment of idle dollar-denominated funds. Financial institutions may participate directly in the worldwide "Eurodollar market" or they may employ international money brokers to place their funds.

A United States bank normally is responsible for the ultimate solvency of its foreign branches, which are "office[s]" of the bank (12 C.F.R. 211.2(h)). See 3 Fed. Res. Bull. 198 (1917); see also Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983). Nevertheless, the federal government requires that a United States bank "shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office" (12 U.S.C. 604).

In addition, the federal government has drawn some important distinctions between a United States bank's foreign and domestic deposits. For example, Congress has dictated that federally imposed deposit reserve requirements "shall not apply to deposits payable only outside the States of the United States and the District of Columbia" (12 U.S.C. 461(b)(6)). This exemption, which was codified in 1980, reflects a Federal Reserve Board practice dating back to 1918. See H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979); 125 Cong. Rec. 19,671 (1979); 12 C.F.R. 204.1(c)(5) and 204.128; 35 Fed. Reg. 2768 (1970); 4 Fed. Res. Bull. 1123 (1918). Similarly, for more than 50 years, Congress has exempted from FDIC insurance assessments and coverage deposits "payable only at an office * * * located outside of the States of the United States." 12 U.S.C. 1813(*l*)(5)(A). And when Congress or the Federal Reserve Board has imposed interest rate, payment, and advertising limitations on deposits, it generally has provided that such limitations do not apply to deposits payable only abroad. See 12 U.S.C. 371a, 371b; 12 C.F.R. 217.1(c)(2); 21 Fed. Res. Bull. 862, 863 (1935).[6]

2. Citibank currently operates a branch office in Manila, the Republic of the Philippines (Citibank/Manila). Although Citibank/Manila obtains funding from Philippine depositors, it

[6] The Federal Reserve Board informs us that, as of December 31, 1988, 171 federally chartered banks maintained more than 878 foreign branches and that, as of December 31, 1987, the deposits booked at those foreign branches amounted to more than $240 billion.

also obtains a portion of the funds needed for lending through Eurodollar deposits. Thus, in June 1983, a Singapore money broker acting on behalf of WFAL, a Singapore bank owned by Wells Fargo Bank, N.A., placed two Eurodollar deposits with Citibank/Manila. The broker telephoned Citibank/Manila and reached an oral agreement as to the amount of the deposits ($1 million each), the interest rate (10%), and the maturity date (December 1983). In accordance with the customs of the Eurodollar market, the parties exchanged brief computer-generated telex messages confirming those terms. The telexes also provided routing instructions for accomplishing transfer of the funds. As in the case of most Eurodollar transactions, the transfer was to be cleared through the parties' correspondent New York City banks. Pet. App. 2a-3a, 15a-16a, 41a-42a, 46a-47a.

The deposits proceeded routinely. WFAL, which maintained a correspondent account at the New York City office of Wells Fargo Bank, N.A., instructed that office to transfer $2 million from the WFAL account to Citibank/Manila's correspondent account at the New York City office of Citibank. The correspondent banks then effected the transfer through the use of the New York Clearing House Association's Interbank Payments System (CHIPS), an automated clearing mechanism that, among other things, permits member banks and other participants to credit and debit interbank dollar payments electronically and provides virtually instantaneous transfers of funds. See Pet. App. 16a, 20a, 45a; N.Y. Clearinghouse Ass'n and Inst. of Int'l Bankers Amici Br. at 1-2, 7, 11.[7]

[7] The correspondent banks typically use CHIPS to transfer funds from a foreign branch's New York account to the foreign branch. For example, once WFAL's funds had been electronically credited to Citibank/Manila's New York account, Citibank/Manila could enter into a "currency swap" agreement with the Philippine Central Bank to exchange the dollars for pesos at a specified rate and to re-exchange pesos for dollars at a specified rate and date in the future. To clear that transaction, Citibank/Manila's correspondent bank would transfer the dollars from Citibank/Manila's New York account through CHIPS to the Philippine Central Bank's correspondent New York account. The Philippine Central Bank would then credit pesos to Citibank/Manila's account with the Philippine Central Bank in Manila. Citibank informs us that such a transaction took place in this case.

If WFAL's interbank placements had followed the normal pattern for repayment, Citibank/Manila would have collected the necessary dollars—by completing a "currency swap" with the Philippine Central Bank (see note 7, *supra*) or from other sources—and those Eurodollars would have retraced the route through the New York correspondent banks to WFAL. Prior to the time for repayment, however, the Philippine government issued emergency economic regulations that prevented that method of repayment. Specifically, the Philippine Monetary Board issued a Memorandum to Authorized Agent Banks (MAAB 47) requiring that "remittance of foreign exchange for repayment of principal on all foreign obligations due to the foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank * * * for prior approval" (Pet. App. 63a). The Philippine Central Bank interpreted that decree to prohibit Citibank/Manila from repaying WFAL using its Philippine assets, and Citibank/Manila thereafter failed to repay WFAL's deposits at maturity. *Id.* at 3a-4a, 22a-23a, 30a-31a, 42a, 47a-48a.

WFAL commenced this action against Citibank on February 10, 1984, in the United States District Court for the Southern District of New York, to obtain repayment of its Citibank/Manila deposits.[8] Citibank/Manila obtained permission from the Philippine Central Bank to repay the deposits—to the extent Citibank/Manila could—through the use of its non-Philippine dollar-denominated accounts (such as Citibank/Manila's New York account). As a result, Citibank/Manila was able to repay $934,000 of the $2 million owed. In addition, the Philippine Central Bank has permitted Citibank/Manila to reconvert sufficient pesos into dollars to make interest payments

[8] WFAL's complaint invoked the court's jurisdiction based on diversity of citizenship (28 U.S.C. 1332) and on a provision of federal banking law providing that "all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, * * * shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits * * * " (12 U.S.C. 632). See Pet. App. 19a.

on the remaining principal. Wells Fargo seeks return of the unpaid portion of the principal. Pet. App. 4a, 28a-29a, 42a, 48a.

WFAL moved for summary judgment, but the district court denied WFAL's motion (Pet. App. 41a-55a), concluding that the case hinged upon the interpretation of the parties' agreement (*id.* at 50a), which in turn depended upon the meaning of their telex communications "as they were used in the Eurodollar trade" (*id.* at 54a). The court then held a trial and ruled that Citibank's home office was required to repay the deposits. *Id.* at 28a-38a. The district court accepted Citibank's "invitation to assume that Philippine law governed this action" (*id.* at 30a) and, after reviewing the parties' conflicting affidavits concerning the law of that country, "conclude[d] that under Philippine law Citibank's worldwide assets are available for satisfaction of plaintiff's claim" (*id.* at 35a).[9]

Citibank appealed, arguing that Philippine law, correctly applied, required judgment for Citibank and that the district court's interpretation of Philippine law conflicts with the United States' banking law and policy. The United States also filed an amicus brief urging reversal. The court of appeals heard argument and remanded the case for clarification. Pet. App. 25a-27a. The court of appeals found it "unclear from the district court's [opinion] whether the court found that the parties agreed that the deposits were collectible only at the Manila branch" and whether Philippine law "precludes or negates an agreement between the parties to have the deposits collectible outside of Manila" (*id.* at 25a-26a). It therefore requested the district court to address four specific questions relevant to that issue.[10]

[9] The court determined that its reliance on Philippine law "renders irrelevant most of the questions the parties have disputed before us" (Pet. App. 35a). It nevertheless observed that neither party had established a relevant Eurodollar trade "custom or practice" that resolved the matter (*id.* at 35a-36a). It also "accepted – for the purposes of this lawsuit – the proposition that the deposits were payable only in Manila" (*id.* at 36a), but concluded that its resolution of the dispute rendered that question moot (*ibid.*).

[10] The court specifically asked:

(a) Whether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in Manila.

On remand, the district court provided a brief answer to each of the questions. Pet. App. 12a-24a. The court first addressed whether the parties had reached agreement on the place of repayment of the deposit. The court stated that "it appears to us that repayment and collection describe two distinct concepts" (*id.* at 14a):

> Repayment refers to the location where wire transfers effectuating repayment at maturity were to occur. Collection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment.

Ibid. The court then ruled, based on the routing instructions contained in Citibank/Manila's and WFAL's telex confirmations, that the parties had "agree[d] that repayment was to occur in New York" (*id.* at 16a). It further concluded, however, that the parties had reached no agreement as to where the debt was collectible, reiterating a previous observation that "neither party succeeded in establishing any universal understanding amounting to custom or practice within the banking community which would imply a collection term into the contract" (*id.* at 17a).[11]

(b) If there was an agreement, what were its essential terms?

(c) Whether Philippine law * * * precludes or negates an agreement between the parties to have the deposits collectible outside of Manila.

(d) If there is no controlling Philippine law referred to in (c) above, what law does control?

Pet. App. 26a.

[11] In answer to the court of appeals' second and third questions, the district court stated that the parties agreed only that repayment would occur in New York (Pet. App. 18a) and that Philippine law apparently would not preclude or negate an agreement between the parties to have the deposits collectible outside Manila (*ibid.*). In answer to the fourth question, the court reasoned that, given the need for uniform banking rules, the parties' contacts with New York, and the fact that Eurodollar transactions are customarily cleared in New York, New York law should govern the question of collection (*id.* at 18a-24a). Applying New York law, the court concluded that "Citibank is liable for the debt of its Manila branch and plaintiff is entitled to look to Citibank's worldwide assets for satisfaction of its deposits" (*id.* at 24a).

Citibank again appealed, and the United States submitted a letter supporting Citibank's position. The court of appeals nevertheless affirmed the district court's judgment (Pet. App. 1a-8a). The court characterized the dispute as a contract action in which WFAL sought repayment of a debt. The court observed that generally "a creditor may collect or enforce a debt wherever he can obtain jurisdiction over the debtor" (*id.* at 5a), explaining:

> "All debts are payable everywhere, unless there be some special limitation or provision in respect to payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the creditor everywhere."

Id. at 5a-6a (quoting *Harris* v. *Balk*, 198 U.S. 215, 222-223 (1905), and authorities cited therein (internal quotation marks omitted)). The court further recognized, however, an exception to this general rule:

> A special limitation has traditionally be recognized under general banking principles. Thus, " '[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried. . . .' "

Id. at 6a (quoting *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862 (2d Cir. 1981) (quoting Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 975 (1979)), cert. denied, 459 U.S. 976 (1982)).

The court explained that as a consequence of that special banking exception, a debt on a bank deposit "normally authorizes a demand for the money only at the relevant branch" (Pet. App. 6a). "This normal limitation on the situs of a banking debt is, however, subject to variation by agreement of the parties. If the parties agree that repayment of a deposit in a foreign bank or branch may occur at another location, they authorize demand and collection at that other location" (*ibid.*).

The court of appeals stated that "the district court found that the parties had agreed that repayment was to occur in New York" (Pet. App. 7a), and it concluded that this factual determination "plainly is not clearly erroneous" (*ibid.*), reasoning that the telex communications specifying that the funds shall be transferred through the parties' correspondent New York banks "amply support the district court's finding that the parties agreed that repayment would be made in New York" (*ibid.*). It noted that the district court had treated repayment and collection as divisible concepts, but it concluded that the distinction was immaterial because "a debt may be collected wherever it is repayable" (*id.* at 8a). The court accordingly held that WFAL was "entitled to collect the deposits out of Citibank assets in New York" (*ibid.*).

DISCUSSION

Citibank asserts that the court of appeals erred in concluding that the parties had agreed that WFAL's deposits were payable in New York. It urges this Court to review the decision and clarify, as a matter of federal law, that Citibank is not liable for repayment of a foreign branch deposit when a foreign sovereign prevents the foreign branch from making repayment. We believe that Citibank is correct in asserting that the court of appeals misconstrued the parties' deposit agreements. Moreover, that mistake—though seemingly narrow and factbound—could have serious consequences for the international banking community. We therefore submit that this Court should grant Citibank's petition for a writ of certiorari with respect to that issue (Question 2).

The federal bank regulatory agencies are also concerned that the court of appeals' decision creates serious tension with the federal bank regulatory framework. In our view, however, if this Court interprets the parties' deposit agreements in accordance with established banking law principles, there would be no occasion to address how federal law may affect Citibank's repayment obligations (Question 1).

1. Citibank asserts and WFAL does not dispute that the court of appeals correctly identified several well-established "general banking law principles" governing private disputes between banks and their depositors that are relevant to this case.[12]

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[12] The court's reference to "general banking law principles" describes, of course, established tenets of banking law that are so widely accepted that

Specifically, the court recognized that "[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried" and that "[t]he consequence of this limitation is that a debt on a deposit normally authorizes a demand for the money only at the relevant branch" (Pet. App. 6a).[13] The court mistakenly concluded, however, that the parties had elected to depart from the general rule in this case and agreed, instead, that the deposits were payable in New York. That conclusion is

they have become the "law merchant" in most jurisdictions. In this country, our federal system has generally relied on the collective voices of the States to articulate and harmonize these principles (see, *e.g.*, *National Bank* v. *Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869)), while foreign countries are most likely to speak with a single voice. As a practical matter, the "general banking law principles" developed in major commercial nations, such as the United States and England, frequently gain universal acceptance. The principles that we describe herein govern private disputes between banks and their depositors and do not necessarily apply to government enforcement actions. See, *e.g.*, *United States* v. *National Bank of Commerce*, 472 U.S. 713, 726-733 (1985).

[13] "It has long been accepted that a bank that accepts a deposit at one branch is not liable to return the deposit or to honor a check drawn against it at another branch. To this extent, branches of a bank are treated as 'separate entities' and not simply as 'teller's windows' of the home office." Heininger, *supra*, 11 Law & Pol. Int'l Bus. at 930-931 (footnote omitted). See, *e.g.*, *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d at 862 (citing Heininger); *Det Bergenske Dampskibsselskab* v. *Sabre Shipping Corp.*, 341 F.2d 50, 53 (2d Cir. 1965); *United States* v. *First Nat'l City Bank*, 321 F.2d 14, 19-20 (2d Cir. 1963), aff'd en banc, 325 F.2d 1020 (1964), rev'd on other grounds, 379 U.S. 378 (1965); *McCloskey* v. *Chase Manhattan Bank*, 11 N.Y.2d 936, 183 N.E. 2d 227, 228 N.Y.S.2d 825 (1962); *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. 742, 744, 249 N.Y.S. 319, 321 (City Ct. 1931). England and other common law jurisdictions have long recognized that rule. See, *e.g.*, *Joachimson* v. *Swiss Bank Corp.*, [1921] 3 K.B. 110, 127 ("promise to repay is to repay at the branch of the bank where the account is kept"); *Clare & Co.* v. *Dresdner Bank*, [1915] 2 K.B. 576, 578 ("no obligation on a bank to pay in one country a debt due to a customer on current account in another country"). The civil law countries seem to follow that rule as well. See *Dame Ba Tu Thu Van* v. *Banque National de Paris*, Tribunal de grande instance de Paris, 9eme Chambre (Mar. 8 1985), and *Dame Thi to Tam et autres* v. *Banque Francaise Commerciale*, Tribunal de grande instance de Paris, 9eme Chambre (Mar. 12 1985), *reported in* Recueil Dalloz Sirey 500-501 (1985). We discuss at note 17, *infra*, the consequences of a branch's failure to pay on demand at the location where the payment is due.

inconsistent with the district court's factual findings concerning the scope of the parties' agreements, and is contrary to the actual operation of the Eurodollar market. Moreover, for the reasons explained below (see pp. 15-17, *infra*), it raises consequences of sufficient importance to justify this Court's review.

a. The court of appeals appears to have misunderstood the district court's distinction between "repayment" and "collection" of a debt and the consequently limited nature of the district court's holding. The district court used the term "repayment" to describe "the location where the wire transfers *effectuating repayment* at maturity were to occur" (Pet. App. 14a (emphasis added)). It used the term "collection" to describe "the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers" (*ibid.*). Applying those definitions, it concluded that "[t]he only agreement relating to collection or repayment was that repayment would occur in New York" (*id.* at 18a). See p. 7, *supra*.

The district court's somewhat circular definition of the place of repayment refers simply to the place where the wire transfers would occur. Under that definition, the court's finding of "repayment" in New York is correct but unhelpful—no one disputes that the transfer of funds between correspondent banks would, by necessity, occur in New York.[14] The court's definition of "collection," by contrast, refers to the location where WFAL could demand payment in the event the wire transfers did not occur. The court concluded that the parties did *not* reach agreement on that issue. Pet. App. 17a. Thus, the district court found that the parties had agreed only that WFAL's deposits would be returned (*i.e.*, "repaid") by routing the funds through correspondent New York banks; the parties had reached no agreement as to where the deposits were legally payable (*i.e.*, "collectible").

[14] As the New York Clearing House Association and the Institute of International Bankers explain in their amici curiae brief, there is no other feasible way to settle such transactions (Br. 7-9). See also Pet. App. 20a ("Eurodollar transactions denominated in U.S. dollars customarily are cleared in New York"); *id.* at 45a.

The court of appeals failed to recognize that distinction and, as a result, effectively nullified the district court's findings. It accepted the district court's finding of an agreement on "repayment" (Pet. App. 7a), but it then gave that finding essentially the same legal consequences that the district court had ascribed to an agreement on "collection" (*id.* at 7a, 8a). The court of appeals' conclusion—that the parties had agreed the deposit was legally payable in New York—cannot be reconciled with the district court's finding that the parties' "only agreement" (*id.* at 18a) related to "the location where the wire transfers effectuating repayment at maturity were to occur" (*id.* at 14a).[15]

The court of appeals' error has crucial significance.[16] There is no question that Citibank/Manila was the "branch where the deposit is carried" (Pet. App. 6a). If there was no agreement altering the general legal rule that "a debt on a deposit normally authorizes a demand for the money only at the relevant branch" (*ibid.*), then general banking law principles would dictate that WFAL's deposits are legally payable only at Citibank/Manila. The question in this case would then be whether Citibank/Manila has committed an actionable breach of the deposit agreements by wrongfully refusing payment at *that* location. See *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 405 n.27 (1965) (Harlan, J., dissenting).[17]

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[15] The court of appeals stated (Pet. App. 7a) that the district court's factual finding concerning repayment was not "clearly erroneous" (Fed. R. Civ. P. 52(a)), citing the district court's reliance on the parties' telex confirmations setting forth the routing instructions between the correspondent banks. See Pet. App. 16a-17a. However, the district court's exclusive reliance on those telexes simply underscores that it was addressing only the question of where the wire transfers would occur and not where the deposits were legally payable. See *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1124-1125 (5th Cir. 1985) (distinguishing between "remittances" and "payments"); *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222, 224 (2d Cir. 1985) (accord).

[16] The court itself found the existence of an agreement essential to its holding. It noted that amici (including the United States) had expressed a " 'policy interest in the principle that, *in the absence of agreement to the contrary*, a U.S. bank should not bear the risk that a foreign government will impose restrictions on the deposits of its foreign branches' " (Pet. App. 8a) and specifically stated that "[o]ur affirmance in the present case is based on the district court's finding of just such an agreement" (*ibid.*).

[17] If the branch wrongfully refuses to repay the deposit on demand, the depositor may have a cause of action against the home office for the branch's

b. The court of appeals' result is not only contrary to the district court's findings, but it is also fundamentally inconsistent with the federal regulatory framework and the actual operation of the Eurodollar market. This case involves two routine Eurodollar deposits. See Pet. App. 42a. Eurodollar deposits have certain distinctive characteristics. Of particular relevance here, a Eurodollar deposit is universally regarded as legally payable *only* outside the United States.

As we have explained, United States bank deposits are generally subject to reserve requirements and deposit insurance assessments. See p. 3, *supra*. However, Congress and the Federal Reserve Board have exempted from those requirements bank deposits that are "payable only" outside the United States. See 12 U.S.C. 461(b)(6); 12 U.S.C. 1813(*l*)(5)(A); 12 C.F.R. 204.1(c)(5) and 204.128. Financial institutions that accept deposits qualifying for those prescribed exemptions can realize substantial savings in acquiring funds. See R. Dale, *The Regulation of International Banking* 12-13 (1986). The foreign branches of United States banks realize those savings (and are thereby able to offer higher interest rates and compete with foreign banks) by accepting Eurodollar deposits that are legally "payable only" at the foreign branch. The federal government's regulatory exemptions, which provide a "forceful stimulus" and "the basic inducement" for U.S. banks to participate in the Eurodollar market (*id.* at 12, 14, 23), also set forth a necessary

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breach of the deposit agreement. Heininger, *supra*, 11 Law & Pol. Int'l Bus. at 926. See, *e.g.*, *First Nat'l City Bank*, 321 F.2d at 20; see also 379 U.S. at 380-381. As Justice Harlan explained with respect to the Uruguayan account involved in that case:

> The bank account is a contract for payment on demand at the Montevideo branch. If demand were wrongfully refused, a cause of action for the breach of contract would be created on which [the depositor] could sue in New York. Thus, analytically, it is not the account itself which would become payable in New York, but damages for breach of the contract to pay on demand in Montevideo.

379 U.S. at 405 n.27. Similarly, the question in this case is whether Citibank/Manila has wrongfully refused to repay in light of the terms of the deposit agreements and the repayment restrictions imposed by Philippine law.

condition for that participation: the foreign branch deposit *must* be "payable only" abroad.[18]

The testimony offered at trial indicates that WFAL's deposits met that condition. WFAL placed its deposits with Citibank/Manila through the standard methods that are routinely employed in Eurodollar transactions. See Pet. App. 45a.[19] Citibank's and WFAL's respective experts disagreed on a number of matters, but they agreed that the difference between the rate of interest paid on the WFAL deposits (10%) and the lower rate that would be paid on a deposit placed with Citibank's New York office was attributable, at least in part, to the fact that the WFAL deposits were not subject to domestic reserve and in-

[18] Indeed, commentators discussing the Eurodollar market generally *define* Eurodollars as dollar-denominated deposits that have their situs outside the United States. See, *e.g.*, E. Roussakis, *Commercial Banking in an Era of Deregulation* 188 (1984) ("Eurodollars are deposits denominated in U.S. dollars and held by banks located outside the United States, including foreign branches of U.S. banks."); P. Oppenheim, *International Banking* 146 (3d ed. 1978) ("A loan in Eurodollars may be made to any borrower outside the United States. The loan must be made by a banking office also outside the United States."); S. Robinson, *Multinational Banking* 162 (1972) ("[A] Eurodollar represents a debt denominated in U.S. currency owed by a banking institution located outside the United States as a result of a dollar on deposit in that institution."); M. Friedman, *The Euro-Dollar Market: Some First Principles*, in *The Eurodollar* 272, 275 (H. Prochnow ed. 1970) ("[Eurodollars] are deposit liabilities, denominated in dollars, of banks outside the United States. * * * [T]hey are obligations of banking offices located outside the U.S."); Harfield, *International Money Management: The Eurodollar*, 89 Banking L. J. 579, 585 (1972) ("Let me remind you of the critical definition of the Eurodollar. It is an obligation undertaken by an institution outside of the United States to make payment, outside of the United States, of a United States dollar."). WFAL's expert witness, Professor Gunter Dufey, agreed that "[a] Eurodollar deposit is a time deposit denominated in U.S. dollars in a bank or bank branch located outside the United States" (Tr. 632).

[19] WFAL's counsel stated at the outset of the trial that "these are very standard transactions" (Tr. 6). Citibank's executive vice-president and chief financial officer, Donald Howard, and WFAL's expert witness, Professor Dufey, described the transaction of Eurodollar placements in general terms that mirror the steps followed here. See Tr. 448-455, 474-478. Professor Dufey also acknowledged that "a dollar deposit with a Manila branch of Citibank is a Eurodollar deposit" (Tr. 638-639).

surance requirements.[20] As we have just explained, this would be true only if—as both of the commercially sophisticated parties must have understood—the WFAL deposits were "payable only" outside of the United States. See 12 U.S.C. 461(b)(6); 12 U.S.C. 1813(*l*)(5)(A).

c. The court of appeals' conclusion that Citibank and WFAL had reached agreement that WFAL's deposits were payable in New York is inconsistent with the district court's findings, the actual operation of the Eurodollar market, and the testimony at trial. Moreover, the United States and other parties that have a significant interest in the safe and sound operation of the Eurodollar market agree that the court of appeals has made a serious mistake with potentially far-reaching consequences. The federal bank regulatory agencies administering the statutes that have, in essence, created the Eurodollar market—including the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency—are in agreement that WFAL's deposits have their situs at Citibank/Manila. The New York Clearing House Association, which clears approximately $750 billion in interbank payments each day, and the Institute of International Bankers, whose membership includes 230 banks from more than 50 countries, have reached the same conclusion. See N.Y. Clearing House Ass'n and Inst. of Int'l Bankers Amici Br. The Federal Reserve Bank of New York, which administers reserve requirements for New York banks, filed an amicus curiae brief in the court of appeals that supports that view as well. See Pet. 14. In short, the court of appeals' decision is manifestly inconsistent with the settled understandings of Eurodollar market participants.

d. Although this Court normally would not reexamine a court of appeals' interpretation of a contractual agreement, such review, in our view, is warranted here. As an initial matter,

[20] That view was expressed by Donald Howard (Tr. 443-444, 452), Serge Ballenger, a French bank executive (Tr. 863-864), and Ian Giddy, a business professor (Tr. 1032, 1088-1089) who testified on Citibank's behalf concerning international banking practices. The view was also expressed by WFAL's counsel in his opening statement (*id.* at 63) and by Professor Dufey (Tr. 598, 601, 640, 704-706), who testified on WFAL's behalf.

Congress has determined that disputes "arising out of transactions involving international or foreign banking" are sufficiently important and have a sufficient nexus to federal interests to be "deemed" federal questions for purposes of federal court jurisdiction. See 12 U.S.C. 632. See note 8, *supra*. This Court may therefore properly exercise its jurisdiction, in an appropriate case, to assure that the courts of appeals have correctly decided such questions.

We believe that the practical consequences of the court of appeals' error warrant the Court's intervention in this instance. In holding that the parties reached agreement that the deposits were payable in New York, the court of appeals relied exclusively on the same standard routing instructions, contained in the parties' telex confirmations, that are routinely employed in the Eurodollar market for clearing billions of dollars of deposits through correspondent New York banks every day. See Pet. App. 7a. The court of appeals' decision would effectively repudiate the established market understanding that those standard routing instructions do not affect the situs of Eurodollar deposits. Thus, the decision would have international repercussions and would call into question the situs of hundreds of billions of dollar-denominated deposits—and their consequent exemption from federal reserve requirements—that have been or will be placed in accordance with standard market practices.[21]

This uncertainty, which has not yet been fully felt, would impose serious burdens on the Eurodollar market, which plays a central role in international finance.[22] Eurodollar transaction confirmations are not governed by formal rules or regulations. They have evolved as a product of international banking practice in a world-wide exchange that transfers massive obligations

[21] As WFAL itself explained at the outset of the trial, "since these are standard transactions, [the case] will have considerable precedential value in the business sense, in the business world, among bankers * * * however a judge finds the understanding to be" (Tr. 6).

[22] The full effect of the court of appeals' decision is not yet apparent because the international banking community is awaiting this Court's action on Citibank's petition for a writ of certiorari.

virtually instantaneously, with minimal negotiation and documentation, among thousands of participants.[23] The Eurodollar market participants had a clear understanding, prior to the court of appeals' ruling, that routing instructions do not alter the situs of the debt. The court of appeals' decision would cast world-wide uncertainty on that settled understanding. We have serious concerns whether the bank regulatory agencies or any individual market participant could effectively resolve, as a prospective matter, the confusion that the court of appeals' decision would produce. But even if that were possible, the court of appeals' interim disruption of settled rules could result in an unjust redistribution of millions of dollars among market participants that reasonably relied on settled practices.[24] We submit that, given the practical importance of the court of appeals' error, review by this Court is warranted.[25]

2. Citibank also urges that this Court grant review to articulate a federal rule that, in the absence of an express agreement to the contrary, a United States bank should not be held to guaran-

[23] A Citibank witness explained:

> This is a high-volume business, huge numbers of transactions, huge amounts of moneys moving very quickly each day. They're not long, negotiated contracts. It is telex, confirmation. It is a very efficient, factory operation.
>
> There is a practice * * * that surrounds this, that grows up with it. That's, as I say, what I've related today, is the way we understand the market and the way we've always operated.

Tr. 1087 (Rodney B. Wagner, vice chairman of the Credit Policy Committee of Morgan Guaranty Company).

[24] Citibank indicates that there are approximately $300 million in outstanding Eurodollar deposits booked at the Citibank/Manila branch. Pet. 6. See Tr. 911-912.

[25] WFAL says little in support of the court of appeals' conclusion that the telex routing instructions rendered the deposits payable in New York. Instead, WFAL urges this Court to deny Citibank's petition for a writ of certiorari based on grounds set forth in the district court's opinions. See, *e.g.*, Br. in Opp. 7. We do not believe that such action would be appropriate in this case. The court of appeals' only basis for affirmance of the district court's decision warrants correction. The court of appeals did not pass on Citibank's other challenges to the district court's decision, which—as we explain below—would be subject to resolution on remand.

tee against the risk of foreign sovereign action that prevents its foreign branch from repaying deposits. Pet. 10. The federal banking agencies have long premised their regulations on an understanding that a depositor who opens a foreign branch account assumes the risk that the foreign government may restrict his right to repayment. Citibank is correct that a contrary understanding would create a serious tension with federal reserve and deposit insurance requirements.[26] We submit, however, that at this juncture the Court need not articulate a federal rule governing these matters. The court of appeals' mistaken conclusion that the parties had agreed that WFAL deposits were payable in New York pretermitted that court's consideration of Citibank's various assignments of district court error. If this Court agrees that the court of appeals erred in finding an agreement, the case should be remanded to allow the court of appeals to complete its normal review functions, which are likely to eliminate any occasion to address the need for a federal rule.

a. Citibank argued below that the WFAL deposits are governed by the law of their situs, *viz.*, Philippine law, and that the Philippine government's decree prohibiting "remittance of foreign exchange" (Pet. App. 63a) at the place where the accounts were legally payable suspended the contractual obligation to repay WFAL's dollar-denominated deposits. Citibank asserted that the Eurodollar deposit agreements constituted a contract for payment upon maturity at the Citibank/Manila branch and that if the branch wrongfully refused payment at that location, WFAL might have a cause of action for breach of contract.[27] Citibank further contended, however, that since the

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[26] See, *e.g.*, 12 C.F.R. 204.128(c) ("A customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals."); 35 Fed. Reg. 2768 (1970) (accord); 4 Fed. Res. Bull. 1123 (1918) (foreign branches "are necessarily subject in their local operations to the laws of various sovereignties, and it was, therefore, necessary to vest in the Federal Reserve Board some discretion as to the restrictions to be imposed upon the operations of foreign branches in order that the interests of the parent bank may be safeguarded and the creditors in this country might be protected").

[27] As we explain in note 17, *supra*, "analytically, it is not the account itself which would become payable in New York, but damages for breach of the

Philippine decree prohibited repayment at the place where the deposits were legally payable, WFAL's demand had not been wrongfully refused and there accordingly was no actionable breach of contract under Philippine law. See Citibank, N.A. C.A. Br. at 17-18, 19-26.[28]

b. The court of appeals did not address these arguments, and it would be obligated to address them on remand. Indeed, we believe that these arguments have substantial force. It is widely recognized that a foreign sovereign has broad authority to affect debtor-creditor relationships involving debts payable within its jurisdiction.[29] Indeed, WFAL itself concedes that

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contract to pay on demand [at the branch]." *United States* v. *First Nat'l City Bank*, 379 U.S. at 405 n.27 (Harlan, J. dissenting).

[28] Citibank also argued that "even if" the district court had correctly interpreted Philippine law in its first opinion, that interpretation should not be given effect because, among other matters, it would conflict with United States' banking law and policy. Citibank, N.A. C.A. Br. at 18, 31-42. When the district court ruled on limited remand that New York law applied, Citibank filed a letter brief disputing that contention, renewing its previous arguments, and asserting that, in any event, the same result would obtain under New York law. See Letter Br. of Citibank, N.A. Following Limited Remand (May 2, 1988).

[29] United States courts recognize that a sovereign generally has jurisdiction to prescribe law with respect to conduct that takes place, and the status of persons or interests in things present, within its territory. See Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987). Cf. *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J. concurring) ("If I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there."). Thus, the Second Circuit has held that the act of state doctrine generally requires U.S. courts to refrain from questioning the foreign sovereign's actions with respect to bank deposits that have their situs within the foreign territory. Compare *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222 (1985) (holding that the act of state doctrine bars consideration of a claim for repayment of a bank deposit because the situs of the defendant's obligations was in Mexico) with *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516 (1985) (holding that the act of state doctrine did not preclude creditors from recovering on a debt that had a situs in New York). See also *Garcia* v. *Chase Manhattan Bank, N.A.*, 735 F.2d 645, 650 n.5 (2d Cir. 1984) ("where a foreign government has both the parties and the *res* before it and alters their relationship thereto, our courts realize that there is little

"sovereign action at a branch will sometimes terminate the depositor's right to be paid" (Br. in Opp. 7). Thus, it is fair to say that *both* Citibank and WFAL voluntarily assumed a risk that the Philippine government might alter the terms for repayment of a debt made payable within its territory. If the court of appeals ultimately concludes that this dispute is controlled by Philippine law and that the Philippine repayment moratorium involved in this case excused Citibank/Manila's failure to repay the deposits, there would be no occasion to address whether "federal banking law and policy require that a U.S. bank not be liable" (Pet. 10).

Since there is a significant possibility that the court of appeals could resolve this case in Citibank's favor based on Philippine law, we submit that Citibank's suggestions that federal law may preempt otherwise applicable law or that federal common law should be fashioned to displace that law are not yet squarely presented. Federal preemption and federal common law come into play only if there is a conflict between federal law or policy and otherwise applicable law. See *Boyle* v. *United Technologies Corp.*, 108 S. Ct. 2510, 2515 (1988). Obviously, if the court of appeals determines on remand that Philippine law exempts Citibank from liability, there would be no conflict with the federal interests that Citibank cites.[30] We therefore submit that there is no occasion for this Court to address that question in this proceeding.

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that they can do to change the legal relationship"); Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 Colum. L. Rev. 594, 612, 614-616 (1986) ("foreign sovereign can reasonably expect dominion over a contract that is to be performed within its territory").

[30] The government's amicus curiae brief in the court of appeals, which suggested that Philippine law may be "inconsistent with U.S. law and policy" (Br. i, 12) and that "our federal system may require application of federal common law rules" (*id.* at 11 n.7), gave insufficient attention to this consideration.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to Question 2.

Respectfully submitted.

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On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and Second Circuits

PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 22.6 IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEFS FOR THE UNITED STATES

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PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 22.6 IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEFS FOR THE UNITED STATES

Pursuant to Rule 22.6 of the Rules of this Court, petitioner Citibank, N.A. ("Citibank") files this brief in response to the Solicitor General's *amicus curiae* briefs for the government in these cases.

In its petitions, Citibank asked this Court to grant certiorari in both *Wells Fargo* and *Trinh* to correct a

fundamental error of substantial importance to the U.S. banking system and the body of federal regulations on which that system is based. In response to the Court's invitation, the Solicitor General has joined Citibank in urging that the Court grant certiorari in *Wells Fargo*, although he would prefer that the Court limit its grant to the second of the two questions Citibank has presented. With respect to *Trinh*, the Solicitor General recommends that the Court either grant Citibank's petition and consider the case together with *Wells Fargo* or hold the case until *Wells Fargo* has been decided.

Although Citibank agrees with much of what the Solicitor General says in both *Wells Fargo* and *Trinh*, Citibank believes that the preferred course would be for the Court to grant certiorari as to both of the questions presented in Wells Fargo and to grant certiorari in *Trinh* and consolidate it with *Wells Fargo* for purposes of oral argument. This approach will preserve the Court's prerogative to dispose of the cases on the ground that it concludes to be most appropriate after full briefing and oral argument.

The Solicitor General and Citibank begin from a common starting point. Federal regulation of foreign operations of U.S. banks has long been premised on the fundamental distinction between deposits payable in the United States and those payable only abroad.[1] Indeed, the Federal Reserve Board by regulation (subsequently codified by Congress) has expressly provided that a "customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch

[1] *See* Brief for the United States as Amicus Curiae, *Citibank, N.A. v. Wells Fargo Asia Ltd.*, No. 88-1260, at 18 (filed Nov. 2, 1989) [hereinafter "U.S. *Wells Fargo* Brief"]; Brief for the United States as Amicus Curiae, *Citibank, N.A. v. Trinh*, No. 1031, at 10 n.6 (filed Nov. 2, 1989) [hereinafter "U.S. *Trinh* Brief"].

is located might impose restrictions on withdrawals."[2] The Solicitor General recognizes that any other allocation of sovereign risk would raise serious federal concerns.[3] Thus, the Solicitor General finds that the federal interest involved in these cases is substantial and furthermore unequivocally concludes that the decisions of the courts of appeals in both cases are clearly wrong and harmful.

The Solicitor General believes that there are two alternative ways of dealing with the problems he identifies in *Wells Fargo* and *Trinh*. He agrees that one approach would be that urged by Citibank: articulation of a uniform federal rule specifying when U.S. banks are liable for deposits made with their foreign branches. In the alternative, the Solicitor General contends that proper application of "general banking law principles," grounded in state and foreign law, should be adequate to safeguard the important federal interests at stake in *Wells Fargo* and *Trinh*. The Solicitor General would have this Court correct the lower courts' misapprehension of these general banking law principles pursuant to 12 U.S.C. § 632 (1988), under which suits against national banks "arising out of transactions involving international or foreign banking" are "deemed to arise under the laws of the

[2] 12 C.F.R. § 204.128(c) (1989).

[3] U.S. *Wells Fargo* Brief at 18 ("The federal banking agencies have long premised their regulations on an understanding that a depositor who opens a foreign branch account assumes the risk that the foreign government may restrict his right to repayment. Citibank is correct that a contrary understanding would create a serious tension with federal reserve and deposit insurance requirements."); U.S. *Trinh* Brief at 10 n.6 ("the court's suggestion that the deposit agreement 'must clearly and unmistakably inform depositors that they have no right to proceed against the home office' (Pet. App. 12a) is inconsistent with the general understanding, reflected in the Federal Reserve Board's regulations, that a United States bank's home office is not liable for foreign sovereign interference with a foreign branch's failure to repay a deposit unless the home office expressly undertakes that liability").

United States." There is a fine distinction between federal courts' articulating uniform "general banking law principles" applicable to international banking actions "deemed to arise under" federal law, on the one hand, and based on federal statutes and regulations applicable to international banking, on the other.

Citibank submits that it would be premature for the Court to decide at this point the grounds that it will rely upon in ultimately ruling in *Wells Fargo* or *Trinh*. It may be that, after full briefing and oral argument, the Court will agree with the Solicitor General and reserve the question of federal substantive law for decision in another case, having concluded that there is some narrower ground on which federal interests can be protected in these cases. On the other hand, the Court may conclude that such a narrower ground is not available here, or that, even if available, it is preferable to articulate a federal rule of decision in this case so as to bring greater certainty to what the Solicitor General himself believes to be an uncertain and troublesome area. U.S. *Trinh* Brief at 16. Accordingly, we believe the better course would be for the Court to grant certiorari as to both questions presented in the *Wells Fargo* petition, preserving its ability to rule on either of the two grounds identified by the Solicitor General.

With respect to *Trinh*, the Solicitor General suggests that, if the Court grants certiorari in *Wells Fargo*,

> it may wish to grant this petition as well and consolidate the cases for review. That procedure would allow the Court to examine a broader range of issues —and to correct the potentially troublesome decision in this case—with minimal additional expenditure of its limited resources.

U.S. *Trinh* Brief at 17. In the alternative, the Solicitor General recommends that the Court hold *Trinh* for consideration in light of the Court's ultimate decision in *Wells Fargo*.

Citibank submits that the first of the options offered by the Solicitor General is more efficient and preferable. First, consolidating the two cases will give the Court the opportunity, as the Solicitor General observes, "to examine a broader range of issues." U.S. *Trinh* Brief at 17. *Trinh* presents the same basic problem as *Wells Fargo*, but in a very different factual context and with very different immediate ramifications. Where *Wells Fargo* involves an oral deposit agreement between two sophisticated banks with respect to the off-shore deposits of dollars, *Trinh* involves a passbook savings account of local currency (Vietnamese piasters) deposited by a foreign individual. In addition, *Trinh* raises substantial questions of U.S. foreign relations policy that are better presented in that case than they are in *Wells Fargo*. Such issues include U.S. policy toward U.S. businesses evacuating foreign countries in times of revolution and armed conflict and U.S. participation in claims settlement arrangements growing out of foreign government expropriations. The Court therefore has the rare opportunity to grant certiorari in two cases that together present a relatively comprehensive view of an important federal problem, thereby leading to resolution of many of the issues at one time.

Second, U.S. banks remain at substantial risk from the possibility of foreign civil and political unrest and it is therefore of utmost importance that doctrines such as those relied upon by the court of appeals in *Trinh*—doctrines that the Solicitor General urges are fundamentally mistaken—be put to rest. The small amount of the claim immediately at stake in *Trinh* and the fact that future cases from Vietnam are unlikely in no way limits the extent of the risk posed for the U.S. banking system. Foreign branches of Citibank alone hold hundreds of millions of dollars worth of local currency deposits similar to that involved in *Trinh*, and these branches are often in politically unstable nations; such deposits are now at risk under the court of appeals ruling in *Trinh*. Nor does the

fact that there may not be many Vietnamese cases in the future indicate that *Trinh* is not an important case in its own right. As the Solicitor General agrees, "there is a substantial possibility that American courts may mistakenly apply [*Trinh* and *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982)] as precedent in interpreting other deposit agreements, other foreign substantive law, and other foreign governmental actions." U.S. *Trinh* Brief at 16. Indeed, the Solicitor General recognizes that both the Sixth Circuit below and the Second Circuit in *Vishipco* purported to apply " 'general banking law principle[s]' that are customarily followed worldwide." U.S. *Trinh* Brief at 8. Given that the erroneous decision in *Vishipco* is now "no longer an isolated aberration" (U.S. *Trinh* Brief at 9), and given the need of bank regulators and banks alike to plan for risk in advance of actual crises, it is important that the Court at this stake reserve its prerogative to address directly the issues posed by *Trinh*.

CONCLUSION

In both *Wells Fargo* and *Trinh*, the lower courts have committed errors that raise substantial questions of federal law and policy. In both there are alternative means potentially available for remedying the problem. One alternative is for the Court to articulate a uniform federal rule of bank liability with respect to foreign branch deposits, as urged by Citibank; another route to the same end may be, as the Solicitor General suggests, to correct the mistakes of the lower courts by invoking "general banking law principles" that are "deemed to arise" under federal law by virtue of congressional statute. Given the admitted importance of the federal interests involved, the clear errors of the lower courts, and the opportunity to review this important issue in quite different factual contexts "with minimal additional expenditure of [judicial]

resources" (U.S. *Trinh* Brief at 17), the Court should grant certiorari in both cases and consolidate them for purposes of oral argument.

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SUPPLEMENTAL BRIEF

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VS.

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On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Per Rule 22.6, respondent briefly addresses the views expressed by the United States in its brief of November 2, 1989.

1. This case—"seemingly narrow and factbound" (U.S. Br. 9)—is indeed just that, as the government eventually succeeds in demonstrating. Petitioner's chief financial officer testified that its debt to respondent was repayable in New York (Howard, RT 496), and the district court found that the written confirmation slips used by the parties in the transactions at bench "established an agreement that repayment was to occur in New York" (Pet. App. 16a). Substituting its view of petitioner's "custom and practice" evidence for those of the two courts below, the United States insists that the words "payable in New York" meant "legally payable (i.e. 'collectable')" only in the Philippines. (U.S. Br. 11). But no such agreement was proved. The district court found that in this particular transaction, "payable" meant transfer

of funds by wire to respondent at New York, that there was no custom or practice "that would imply a collection term into the contract," and that "collection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment." (Pet. App. 14a, 17a). None of this was lost on the court of appeals, which noted both that the evidence "amply support[s] the district court's finding that the parties agreed that repayment would be made in New York," and that any theoretical distinction between "payable" and "collectable" was meaningless for want of any "separate agreement restricting where deposits could be collected." (Pet. App. 7a-8a).

2. Addressing the very concerns now expressed by the United States, the court of appeals was at pains to limit its holding to the particular facts of this case. (*Id.* at 8a). Nevertheless, the government asks this Court to "interpret the parties' deposit agreements" anew (U.S. Br. 9), presumably by reweighing the evidence, including all the evidence of "custom and practice" now recycled under lables such as "established market understandings," "settled practices" and the like (e.g., U.S. Br. 9, 15, 17). But the Court does not sit for these purposes; the government no more than substitutes its view of the evidence for that of the trier of fact, and so presents no "very obvious and exceptional showing of error" under the two-court rule, *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *see, also, Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985).

3. The views of the United States are flawed by its uncritical acceptance of petitioner's phrasing of Question 2. As written, the Question speaks of deposits "taken or frozen" by foreign governments, but here, there was no expropriation of respondent's deposits at all. The Philippine government's MAAB 47 decree merely limited petitioner's ability to liquidate certain Philippine assets to repay its debts, leaving Citibank free to apply any non-Philippine assets to that purpose. Both lower courts agreed that New York law required petitioner to repay using non-Philippine assets, and that neither MAAB 47 nor any other Philippine law or policy prohibited this course of action. (Pet. App. 6a-7a, 21a-24a, 34a-36a). The district court also made it abundantly clear that

the controversy at bench did not involve Philippine efforts "to expropriate any part or all of these Deposits," or to "confiscate the assets of any depositor." (*Id.* at 37a).

4. These and other careful limitations of the lower courts amply demonstrate that this case is confined to its particular facts. The United States argues that "sophisticated parties" such as respondent "must have understood" that the deposits were "payable only outside the United States" (U.S. Br. 15), and so must have agreed that respondent would accept the risks of decrees such as MAAB 47. But the district court saw the evidence in a different light; it noted that petitioner "must have known that its depositors were not taking a sovereign risk, or didn't think they were," and that petitioner failed to disabuse respondent and others of this belief, "jealously guarding—almost like a trade secret—its belief that everybody was taking sovereign risk." (Jt. App. 530, 532). The district court stated that petitioner need only introduce candor and precision in future transactions to avoid the result here, phrasing it thus:

> . . . it seems to me that it would be a dead cinch for Citibank to publish their views in such a way that no one in that small community could realistically say he wasn't aware of it when making a deposit. (*Id.* at 533).

This case involves deposit agreements made six years ago, and if the decision is "manifestly inconsistent with the settled understandings" of other banks (U.S. Br. 15), they are free to change their agreements as need be."[1] Accordingly, fears that in fast-moving Eurodollar transactions, participants cannot employ candor and precision in their dealings (U.S. Br. 16-17) are both unfounded and a curious *volte face* from the views expressed concurrently in *Trinh*. There, the United States said (U.S. *Trinh* Br. 17-18):

> . . . Citibank contends that a uniform federal rule is necessary because United States banks may be unable to employ

[1] Indeed, by the time of trial, petitioner itself had already begun using new forms of confirmation slips (Pet. App. 38a), so the decision lacks ongoing significance even as to Citibank.

> deposit agreements that would unambiguously relieve them of liability. This Court does not have the lower court's views of this essentially factual matter. Furthermore, Citibank did not introduce evidence at trial to support that assertion. Thus, the court may ultimately find that the record in this case is inadequate to assess the matter properly.

That is Citibank's predicament here as well. Before trial, it suggested that it would prove that its confirmation slips sent to respondent included a proviso shifting sovereign risk to the latter, but no such evidence was presented. Then at trial, petitioner called attention to its new forms of deposit agreements, but Article III considerations precluded their review. Said the trial court (Pet. App. 38a):

> Neither have we evaluated the new confirmation slips which we are told Citibank has begun using since the events here in issue, and we do not speculate as to what effect, if any, they may have on future transactions in the Eurodollar market.

5. The United States does not call attention to any established rule of federal law implicated, ignored, or misapprehended below, and does not fault the lower courts' exposition of governing principles of New York or Philippine law. As well, the government does not endorse petitioner's call for a "uniform" federal common law, displacing these precedents and prohibiting private parties from agreeing as they see fit.[2] All that is left is reference to "established banking law principles" (U.S. Br. 9), but these turn out to be no more than new names for the evidence of "custom and practice" that both courts found wanting.

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[2] Brief for the United States in *Trinh*, at 17-18, which continues:

> "Indeed, we are not aware of any judicial decisions that question whether a 'uniform federal rule' governs these disputes. We submit that this Court, which would have the last word on the question, should not be the first court to address it." (*Id.* at 19, n.16).

In the present case, Citibank seeks a uniform law by indirection, arguing that the decision below announces "a general principle of law that U.S. banks are *always* liable" (Pet. 12, emphasis in original). The court of appeals squarely stated that this view of its decision was inaccurate. (Pet. App. 8a).

6. Of much the same stripe is the government's discussion of reserve requirements and FDIC insurance programs utilized in the domestic marketplace (U.S. Br. 13-15). Again preempting the findings, the United States observes that this evidence "indicates" that the parties "must have understood" that petitioner's debts to respondent were "payable only outside the United States" (*id.* at 14, 15). But this conclusion does not follow, and does not lead to the further conclusion that the parties agreed that respondent would bear the risk of the Philippine government's MAAB 47 decree. We suppose it could be said that deposit insurance enables small domestic banks to compete on more equal footing with banks whose greater size, strength, and prudence is well known.[3] But the absence of insurance does not eliminate competition or strip depositors of remedies for a bank's failure to repay its debts. Petitioner has known for sixty years that in the international arena, its competive strength flows from its institutional commitments, for a depositor "[pays] his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere," *Sokoloff v. National City Bank*, 239 N.Y. 158, 167, 145 N.E. 917 (1924; Cardozo, J.). As reiterated in *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854, 863 (2 Cir. 1982):

> U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank.

This explains why interest rates paid by petitioner "in secure localities such as London" are the same as those paid "in presumably riskier places such as Manila." (Pet. App. 36a). It follows that when petitioner accepted respondent's deposits upon an unqualified obligation to repay, it availed itself of the very competitive advantage identified in *Sokoloff* and *Vishipco*. Neither the presence nor the absence of the additional competitive advantage of safety provided by FDIC insurance serves to

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[3] Reserve requirements, however, are imposed "solely for the purpose of implementing monetary policy," 12 U.S.C. § 461(b)(2)(B), printed at Pet. App. 56a.

excuse petitioner's failure to honor the institutional obligation it incurred by assuring its foreign depositors "that their deposits will be safer with [it] than they would be in a locally incorporated bank, "*Vishipco, supra*, at 863.

In sum, petitioner failed to sustain its burden of proof as to the discrete facts of this contractual arrangement. It can change (and apparently has changed, Pet. App. 38a) its confirmation slips to avoid the problem that confronted it here. But this record does not furnish grounds to fault the courts below for treating the word "payable" without the adornment of a "trade usage" never proved. The value of the Brief for the United States lies in its exposition of facts not proved, which might be of interest in some other case. *Cf., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 202-03 (1974). Apropos is the government's own prior submission in *Vishipco* (U.S. Br. in *Trinh*, Addendum, at 15a):

> In addition, the Court of Appeals suggested that the result it reached could be avoided in future cases by amendment of the deposit contracts in question, or by separate incorporation in foreign nations that permit that course of action. While both of these proposed solutions may pose practical problems, they highlight the fact that the decision of the court of appeals turns on the particular deposit contracts consummated by petitioner and respondent, not on any issue of federal law warranting this Court's review.

So here as well. The petition should be denied.

DATED: San Francisco, California
November 9, 1989

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(2)

Supreme Court, U.S.
FILED
FEB 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1260

In The
Supreme Court of the United States
OCTOBER TERM, 1988

CITIBANK, N.A.,
Petitioner,

v.

WELLS FARGO ASIA LIMITED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS AS *AMICI CURIAE*

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February 24, 1989

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IN THE

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS AS *AMICI CURIAE*

This brief is filed by consent of the parties pursuant to Rule 36.1 of the Rules of this Court.

Interest of *Amici Curiae*

The New York Clearing House Association (the "Clearing House") is an unincorporated association of twelve leading commercial banks in the City of New York.[1] It

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, and European American Bank.

clears commercial drafts and items in the New York area and operates two electronic payments systems, including the Clearing House Interbank Payments System ("CHIPS"), an international dollar payments system, the functioning of which lies at the heart of this litigation. (*See* 45a).[2] The Clearing House regularly appears as an *amicus curiae* in cases raising significant questions of law relating to banking.

The Institute of International Bankers is a non-profit corporation organized under the laws of New York and is the only nationwide association of foreign banks with operations in the United States. One of the Institute's principal objectives is to present the views of foreign banks operating in the United States on issues of federal and state laws and policies affecting those operations. To this end, the Institute has participated, by filing briefs *amicus curiae*, in cases raising significant legal issues that affect the United States operations of foreign banks.

The Clearing House's and the Institute's member banks are major participants in international banking. As of year-end 1987, for example, of the total of 902 branches operated in foreign countries by all United States banks which are members of the Federal Reserve System, 400 were operated by Clearing House banks, and the total deposit liabilities of the Clearing House member banks' foreign branches exceeded $170 billion. The Institute's membership includes more than 230 foreign banks, from over 50 countries, which maintain subsidiary banks, branches, agencies, or representative offices in the United States.

The *amici* organizations thus represent domestic and foreign banks that place and accept dollar deposits at

[2] Citations in the form "—a" are to the Appendix to the Petition.

thousands of branch locations outside the United States. Although these banks have widely divergent economic interests as dollar depositors or depositories, they also have a common and fundamental interest in the recognition and consistent application of clear and certain rules of law to the field of international banking. Because the decision below represents a radical departure from current law which could cause considerable turmoil in the practice of international banking, *amici* believe that a grant of certiorari and a reversal are required to secure their common interest.[3]

Statement

The court of appeals held Citibank, N.A. liable to pay in New York the balance owing on Eurodollar deposits made in its Manila branch, despite an order of the Philippine government suspending the branch's duty to pay. The court concluded that by specifying that repayment of the deposits would be cleared through their New York correspondents the parties had in effect agreed that demand could be made for payment in New York. That conclusion calls into question the legal status of hundreds of billions of dollars of off-shore deposits throughout the world, virtually all of which are to be repaid at maturity by remittance and clearing through New York correspondent banks.

The court of appeals correctly acknowledged that the normal situs of the deposit accounts at issue was at the

[3] These *amici* have also submitted a brief as *amici curiae* in support of the petition for certiorari filed by Citibank, N.A. in *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir.), *petition for cert. pending*, No. 88-1031 (U.S. Filed Dec. 20, 1988), another case raising the first of the questions presented in the petition herein, and respectfully suggest that the Court consider the two petitions together.

branch where the deposits were placed, Citibank/Manila (6a), and noted that, as a result, the Philippine exchange control regulation known as MAAB 47 would require dismissal of depositor Wells Fargo's claim had the parties not agreed to "repayment" of the Manila deposits in New York (8a). The court of appeals went on to hold, however, that the district court on remand had found an agreement to repay in New York and that the finding was not clearly erroneous. (7a-8a).

The district court's finding as to repayment was based on its reading of certain telex confirmations of the oral deposit contracts, which it recognized were not themselves the contracts. (14a-16a). The district court had correctly recognized from an early stage in the proceeding that Eurodollar deposits (*i.e.*, deposits of United States dollars held outside the United States) are almost invariably made and repaid "through telexed instructions to credit and debit demand accounts located in ['clearing' or 'correspondent'] banks in the United States" and the "['clearing'] bank does not generate the payment or repayment instructions, which originate instead with the foreign bank on whose behalf the demand account is kept." (45a).

The district court adhered to this correct understanding in its decision on remand, where it noted that Eurodollar transactions "customarily are cleared in New York" and "settled through the parties' New York correspondent banks." (20a). It thus characterized the telex confirmations as reflecting "that the interbank placements were accomplished through a series of wire transfers by the parties' correspondent banks in New York, and that, at maturity, the deposits were to be repaid by Citibank, N.A. (Citibank [Manila's] New York correspondent bank) to Wells Fargo Bank International (Wells Fargo [Asia

Limited's] New York correspondent bank) for the account of Wells Fargo's Singapore office." (16a). The district court found these facts "established an agreement that repayment was to occur in New York" (*id.*), and distinguished the place of "repayment"—New York—from the place of "collection" as to which it found no agreement had been reached (14a, 16a-17a).

By "repayment" the district court meant only that "the wire transfers effectuating repayment at maturity were to occur" in New York. (14a). By "collection," on the other hand, the district court referred to the place (or places) Wells Fargo was entitled to demand performance of the contract *by payment* should Citibank "fail to make the required wire transfers at the place of repayment" (*id.*), and thus recognized that the two were not necessarily one and the same. The court of appeals, however, collapsed the two concepts into one by mistakenly equating the parties' agreement that their dollar accounts would be settled ("repaid") through correspondent banks in New York with an agreement—which was never made—that on failure to settle the accounts at maturity performance could be demanded in New York as well as in Manila.

The decision below thus rests entirely on the court of appeals' spurious conclusion that the standard specification of use of the New York dollar clearance system for "repayment" purposes, *i.e.*, a simple routing instruction for the means of remitting funds deposited and payable in another country, transforms Eurodollar deposits into New York-sited payment obligations. This proposition is contrary to settled understandings in the international banking community, threatens disruption to the international dollar payments system and is contrary to United States law and policy.

Summary of Argument

As the court of appeals apparently recognized, deposits made in banks and branch banks outside the United States, whether of United States dollars or another currency, are payable at, sited in, and governed by the law of, the place of deposit. Thus, exchange control regulations of the state of deposit prohibiting remittances outside its territory would ordinarily operate to suspend the obligation to repay international deposits. This result cannot be changed by the fact that large international dollar payments—whether of bank deposits or otherwise—are, and as a practical matter must be, "settled" or "cleared" through New York or that the parties to an orally contracted payment transaction use routing instructions to identify for one another the New York correspondent banks each will use for clearance purposes.

Such a rule of decision would transform the legal situs of hundreds of billions in Eurodollar deposits from countries throughout the world to the City of New York, making the commercial banking systems of the developed world insurers of political and economic stability in less stable and prosperous jurisdictions, contravening basic assumptions of United States bank regulation, providing a blueprint for economic aggression by hostile regimes, and threatening the role of the dollar as the principal currency of international exchange. These consequences are obviously inimical to the interests of the United States, and the rule that would produce them is not only not based on precedent but is inconsistent with the recognition by the Fifth Circuit in *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), that remittance instructions in themselves do not change the situs of a debt.

ARGUMENT

A. The International Dollar Payments System Based on CHIPS Requires Settlement Through New York Clearing Banks.

Approximately 90 percent of *all* international interbank dollar transactions are cleared through the CHIPS electronic payments system operated by the Clearing House. Lingl, *Risk Allocation in International Interbank Electronic Fund Transfers: CHIPS & SWIFT*, 22 HARV. INT'L L.J. 621, 622-30 (1981). CHIPS has 139 participant banks and clears payments averaging $750 billion, but ranging up to $1 trillion, *daily* through a process of a netting of transactions among its participants followed by a settlement of balances through the Federal Reserve Bank of New York. These payments include not only interbank deposits and repayments, but every sort of payment required for the conduct of international finance and commerce. *See* E.G. CORRIGAN, FINANCIAL MARKET STRUCTURE: A LONGER VIEW 15-16 (Federal Reserve Bank of New York, January 1987).

As a practical matter, large dollar transactions *must* be routed through correspondent banks via the CHIPS clearing system, since payment by delivery of actual cash is not feasible and the accomplishment of settlements in any currency is ultimately within the control of the central bank of issue of that currency—in the case of the dollar, the Federal Reserve System of the United States. The only significant dollar clearance system outside the United States is located in Tokyo and nets payments among Japanese banks. Net balances among these clearing banks are then settled, however, through CHIPS. As explained in M. MAYER, THE MONEY BAZAARS 96 (1984), "Eurodollars may be domiciled abroad, but their use inevitably takes

them through the United States. The only 'real' dollars are those created under the aegis of the U.S. Government, and the only lender of last resort that can create dollars in time of need is the Federal Reserve System." Thus, the only alternative to CHIPS for large interbank payments is direct settlement through the Federal Reserve System.

To assure the physical integrity of the CHIPS system, its immediate restoration in the event of mechanical failure and the ultimate ability of each participant to settle, CHIPS requires clearance through CHIPS participants (such as the parties' correspondents in this case) who maintain clearing operations physically located in the City of New York and are able to settle their accounts daily on the books of the Federal Reserve Bank of New York. *See* Rules Governing the Clearing House Interbank Payments System, Rules 6, 13 and 19(a) (as amended, March 25, 1987) (the "CHIPS Rules").[4] Ultimate settlement requires, in the case of a net debit position, adequate credit balances at the Federal Reserve Bank, the purchase of Federal Funds from another bank, or borrowing from the Reserve Bank's discount window.

Given the huge magnitude of daily payments and the role of the dollar in international finance and commerce, the

[4] CHIPS Rule 6 provides in relevant part:

> "A [CHIPS] participant's primary connection to the system shall be located in New York City. Each participant is required to maintain an adequate backup connection to the system. . . .
>
> From the time the system opens until settlement is completed an officer authorized to take appropriate action on behalf of the participant in connection with its CHIPS operations, including, without limitation, the authority to make binding commitments for such institution in the amount of its aggregate gross debit positions over the system, shall be present and available in New York City."

assurance of the ultimate ability to accomplish settlement is essential to the free world's financial system. Indeed, we state advisedly that the consequences of a failure to settle could include, through a domino effect, a "freezing" or collapse of the payments system and financial panic. For this reason, the Clearing House—with the consistent urging and support of the Board of Governors of the Federal Reserve System—has made constant strides both to increase the "finality" of settlement of payments made through CHIPS, including moving from next-day settlement to same-day settlement, and to reduce the risk of a failure to settle (i) by requiring participants to issue "bilateral limits" with respect to the maximum net dollar amount of payments to be received from other participants and (ii) by imposing "caps" on each participant's total net debit position. *See* CHIPS Rules 13, 22 and 23.

Given the role of the United States dollar as the world's principal reserve currency and means of exchange in international commerce, this payments system is probably the most basic mechanism of international finance. While it serves many purposes beyond the transmission of interbank Eurodollar deposits, its existence and functioning are part of the required knowledge of every one of the sophisticated institutions participating in that market, such as the parties to this case. The court below was informed and aware of the system as well, but apparently did not fully appreciate either the system's significance to its decision or the consequences of its decision for the system.

B. The Situs of a Bank's Localized Payment Obligations Can Only Be Varied by Express Agreement.

The rule of law that should have governed the outcome of this case was accurately stated, and then ignored, by the court of appeals:

> "'The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried . . .' [and] a debt on a deposit normally authorizes a demand for the money only at the relevant branch. This normal limitation on the situs of a banking debt is, however, subject to variation by agreement of the parties." (Citations omitted) (6a).

The sorts of commitments that will constitute an agreement to vary the "branch-payable" rule with respect to deposits in foreign branches are clear statements of an intent that payment be made elsewhere and are based on the principled framework of federal law within which such contracts operate, whereby a fundamental distinction is made between deposits payable or not within the United States. To this end Congress has exempted deposits at foreign branches from the reserve requirements of the Federal Reserve Board, 12 U.S.C. § 461; 12 C.F.R. Part 204.1(c)(5) ("Regulation D"), and the payment of Federal Deposit Insurance premiums, 12 U.S.C. § 1813(*l*)(5). The basis for these exemptions is that the deposits are "payable only" at the foreign branch absent express agreement to the contrary, usually in the form of a home office guarantee, and thus do not otherwise represent claims on the home office.

Agreements that payment be made other than at the branch may therefore include explicit promises by the branch that payment can be demanded at its New York home office notwithstanding adverse conditions at the branch, such as that found by the jury in *Garcia* v. *Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984), or formal guarantees of such payment by the home office, as are authorized by specific federal regulation, 12 C.F.R. Part 7.7012 (1988). Had there been such a promise or such a guarantee here, this case would pose no issue warranting the Court's attention. There was neither, however, but a holding instead that the deposit contracts authorized a demand for performance in New York solely because they set forth routing instructions for settlements through the CHIPS system. The implication of a contractual term permitting demand in New York was not only unjustified based on the evidence presented but also on the district court's own distinction between "repayment" and "collection," as to the latter of which it found that *no* agreement had been reached.

C. Use of the CHIPS System Does Not Constitute an Agreement To Alter the Situs of a Deposit.

The entries on the form confirmations relied on by the court below to create a New York-based payment obligation were nothing but a statement of how Wells Fargo/Singapore would send its funds through CHIPS for deposit at Citibank/Manila and how Citibank/Manila would in turn send payment back from Manila to Wells Fargo/Singapore. (16a). The repayment routing through New York was dictated by necessity if the funds were to be returned to Singapore, was not shown to have been an actual term of the oral deposit contracts, and could have been varied by the depositor prior to actual repayment by, for example, specifying a different New York correspondent or even instructing Citibank/Manila to repay by crediting the funds to the account of a Wells Fargo borrower actually located in the Philippines. Such telex confirmation forms are used in thousands of interbank placement transactions settled through CHIPS daily and had never before been deemed by anyone to transform the situs of a deposit made in Manila, Cairo, Rome, Paris or elsewhere to "New York."

The distinction between the situs of a bank deposit (and the obligation to pay and the right to enforce *payment* at that situs, which the district court termed "collection")

and the remittance of funds "to" another place at the depositor's request (which the district court termed "repayment") is not unique to the perhaps esoteric world of interbank Eurodollar deposits. Thus, in the common circumstance where a depositor instructs his bank to send funds due him by wire transfer "to" his own or another's account in another bank, the situs of the deposit account does not "shift" to make the deposit payable at the designated destination. For example, a mortgagor may choose to make his monthly payments by preauthorized, automatic transfers from his bank account in Houston to the account of the mortgagee in New York, or a parent may instruct his Boston bank to make regular remittances in a fixed amount to a college student's account in New York, yet these arrangements would not make the depositors' Houston or Boston accounts payable "at" the receiving bank "in" New York. The dollar-clearing instructions at issue in this case cannot be distinguished from such arrangements, and have no greater legal consequence.

Moreover, the court of appeal's decision that the mere clearing of foreign deposited funds through a New York bank makes New York a situs of the debt is inconsistent with the Fifth Circuit's decision in *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), declining to give such effect to the use of correspondent banks for remittances. There the plaintiffs purchased peso- and dollar-denominated certificates of deposit from Bancomer in Mexico City and utilized American-based correspondents to remit funds and receive interest payments. The Mexican government thereafter issued a decree requiring banks located in Mexico to repay dollar-denominated deposits not in dollars but in pesos, and at a "special" exchange rate which resulted in substantial losses to the depositors. The court dismissed the plaintiff's claim for losses due to

the altered currency terms on the grounds that since the situs of the defendant's obligation was in Mexico, the act of state doctrine barred recovery, and rejected the notion that the situs had been changed by the use of correspondents:

> "[T]he wheels of international finance . . . depend[ ] in large part on the lubricating influence of correspondent banks. [A rule that the transfer of funds through correspondent banks makes such banks a deposit situs] would mean that the deposits held by a bank would have different situses depending on the locations of the correspondent banks that first received them. Potentially a bank would have to comply with different laws for different deposits at a single branch."

Id. at 1125. The Second Circuit itself reached a similar conclusion in *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985).

D. The Decision Below Threatens Substantial Adverse Consequences for the United States and Its Banking System.

The court of appeals appears to have believed that since its decision was based on the specific language of the telex confirmations of the oral deposit contracts in issue, its holding could be avoided by changes in the language of future confirmations. Aside from the fact that such changes would do nothing to avoid the risk arising from existing deposits, it is difficult to see how that objective could be achieved. If the confirmations are to set out the information the parties require to accomplish the transfer of funds and to trace them if they go astray, they will have to name the parties' New York correspondents, which was the critical information leading to the holding below that a New York-sited payment obligation had been created.

Because the Eurodollar market is an oral, nondocumentary market, it must function based on generally understood rules relating to the massive obligations incurred by its participants, and has to date concededly proceeded on the recognition that clearing instructions do not constitute agreements to pay at the place where clearing occurs. Changes in documentation relating to remittance and clearing are thus in the first instance irrelevant to the underlying deposit contract. More importantly, because of the size and complexity of the Eurodollar market, no single participant is capable of effecting a change in the form of agreement adhered to, and even groups of participants—such as the United States banks involved—would be unable to do so in the face of the multinational composition of and interests reflected in that market.

Moreover, the purpose of commercial law is not to give rise to "battles of forms" in which parties seek advantage over one another in otherwise simple and clearly understood transactions, the essential terms of which have always been supplied as a matter of law. Indeed, the process involved in changing forms already in use by thousands of institutions for a number of years as bare-bones confirmations of oral contracts is, as noted above, likely to be neither swift nor certain of accomplishment. The courts ought not to create such a burden without clear legal warrant, particularly when the consequences of doing so are as pernicious as they are here.

If the use of the New York-based dollar clearance system and its contractual specification is to have the effect given it by the court of appeals, the results will not only include frustration of the present regulatory distinctions between deposits payable in the United States and deposits payable outside the United States, *see,* e.g., 12 U.S.C. § 461; 12

C.F.R. Part 204.1(c)(5) (reserve requirements); 12 U.S.C. § 1813(*l*)(5) (payment of FDIC premiums), and the transfer of sovereign risk relating to hundreds of billions of dollars from depositors to depositary institutions either of United States nationality or subject to suit in New York, but might well include the following:

1. The providing of a blueprint for the waging of economic warfare against the United States by hostile regimes, which will be able to freeze branch assets and then send branch depositors to collect in New York.

2. The encouragement of decentralized dollar clearing in the hope of avoiding New York, thereby creating greatly increased risks of payment failures and injury to the financial system and, in the extreme case, resulting in a loss of control by this country over clearing operations involving its own currency.

3. The lessening of the role of the United States dollar in international finance and commerce as risk-averse deposit-taking institutions seek means of avoiding a currency in which clearance is governed by legal principles hostile to their interests.

A well-settled rule of decision having such consequences would be reexamined carefully before it was found to have continued validity. *A fortiori,* a rule of decision having such consequences should not be fashioned from whole cloth as was done below.

Conclusion

For the reasons stated in the petition and herein, *certiorari* should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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February 24, 1989

JOINT APPENDIX

(10)

Supreme Court, U.S.
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No. 88-1260

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CITIBANK, N.A.,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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JOINT APPENDIX

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February 20, 1990

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 25, 1989
CERTIORARI GRANTED DECEMBER 4, 1989

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84-0996

DOCKET ENTRIES

Date	Nr.	PROCEEDINGS
02-10-84	1	Filed complaint issued notice pursuant to rule 28 U.S.C. 636 (c)
02-10-84	2	Filed pltff's Certificate submitted pursuant to rule 9
02-14-84	3	Filed summons with affdvt. of service of summons and complaint and Certificate pursuant to rule 9 Served: Citibank, N.A., on 2-10-84 by Mr. Fleener behald of deft.
2/28/84	4	Filed notice of reassignment to Judge Knapp. Attys of record notified.
3/2/84	5	Filed Stip & Order ext time for deft to answer to 4/2/84. SWEET, J.
4/9/84	6	Filed Stip & Order-ext time for deft to answer to 5/2/84. KNAPP, J.
4/27/84	7	Filed defts notice of motion for an order staying this action, noticed for 5/18/84.
4/27/84	8	Filed memo of law in support of defts motion to stay.
4/27/84	9	Filed ANSWER to the complaint.
4/30/84	10	Filed affdvt of Antonio V. Agcaili in support of defs motion to stay the action.
4/30/84	11	Filed affdvt of Sandra Cipriano in support of defts motion to stay the action.
5/1/84	12	Filed affdvt of David Ferrao in support of defts motion to stay the action.

Date	Nr.	PROCEEDINGS
5/15/84	13	Filed pltffs notice of motion to enjoin Citibank and denying citibanks' motion for a stay of this action, etc., noticed for 5/25/84.
5/15/84	14	Filed memo of law in support of pltff's motion for P/I and in opp to motion for stay.
5/24/84	15	Filed Stip & Order adj defts motion to Stay and pltffs motion for P/I until the 8th of June 84, etc., KNAPP, J.
5-24-84	—	PRE-TRIAL CONFERENCE HELD BY WK.
5-5-84	—	PRE-TRIAL CONFERENCE HELD BY WK.
6/12/84		Filed Memo End on doc. #13—with the consent of movant this motion is deemed withdrawn w/out prejudice to renewal. KNAPP, J.
6/12/84		Filed Memo End on doc. #7—with the consent of the movant, this motion is deemed withdrawn w/out prejudice to renewal. KNAPP, J.
7/31/84	16	Filed Stip & Order of Confidentiality of certain documents and information. KNAPP, J.
7-22-84	17	Filed transcript of record of proceedings dated 6-5-84.
7-18-84	—	PRE-TRIAL CONFERENCE HELD BY WK.
10/22/84	18	Filed pltffs notice of motion for S/J, ret on 11/16/84.
10/22/84	19	Filed memo of law in support of motion for S/J.
12-13-84	—	PRE-TRIAL CONFERENCE HELD BY WK.
12/26/84	20	Filed pltffs notice of motion for S/J, ret date of 2/15/85.

Date	Nr.	PROCEEDINGS
12/26/84	21	Filed memo of law in support of pltffs motion for S/J.
1/22/85	22	Filed Citibank's memo of law in opp to pltiff's motion for S/J.
1/22/85	23	Filed statement of material facts as to which there exist genuine issues to
1/22/85	24	Filed affdvt of D.S. Howard in opp to motion for S/J.
1/22/85	25	Filed affdvt of R.B. Buenaventura in opp to motion for S/J.
1/22/85	26	Filed affdvt of I.H. Giddy in opp to motion for S/J.
1/22/85	27	Filed affdvt of J.E. Hoffman, Jr. in opp to motion for S/J.
1-22-85	—	PRE-TRIAL CONFERENCE HELD BY WK.
2/1/85	28	Filed Reply affdvt of E.E. McAmis in further support of pltffs motion for S/J.
2/1/85	29	Filed Reply Memo of law in support of pltff's motion for S/J.
3/1/85	30	Filed Supplemental Affdvt of Rafael B. Buenaventura.
3-11-85	31	Filed Memorandum of Law in Response to Supplemental Affidavit of Rafael Buenaventura.
4-9-85	32	Filed transcript of record of proceedings dated 2-15-85.
7/2/85	33	Filed Memo & Order—Pltff's motion for summary judgment is denied. A status conference shall be held on 9/30/85. KNAPP, J. CMC 7/2/85
9-30-85	—	PRE-TRIAL CONFERENCE HELD BY WK.

Date	Nr.	PROCEEDINGS
12-2-85	—	Pre-Trial Conference Held By W.K.
4-8-86	—	PRE-TRIAL CONFERENCE HELD BY WK.
6-16-86	—	Pre-Trial Conference Held By W.K.
9-10-86	—	PRE-TRIAL CONFERENCE HELD BY WK.
12-8-86	34	Fld. Summary of deposition testimony to be offered by deft at trial.
12-8-86	35	Fld. Deft's witness list.
12-8-86	36	Fld. Deft's Pretrial Memorandum.
12-10-86	37	Fld. pltf Wells Fargo Asia limited's trial brief in support of judgment for breach of contract.
12-9-86	38	Fld. Pltf's List of Deposition Excerpts.
12-9-86	39	Fld. Pltf's List of Witnesses.
12-10-86	40	Fld. Pltf's Notice purs. to Rule 44.1
12-10-86	41	Fld. Deft's Notice of Deposition of credit du Nord, S.A., by Jean Marie Lepicard on 12/15/86.
12-12-86	42	Fld. Defendant's Affidavit of Antonio V. Agcaoili . . .
12/15/86	43	Fld. Pltffs Affdvt & Notice purs. to rule 44.1 that the pltff intends to offer evidence at trial regarding Philippine law.
12/12/86	44	Fld. Supplemental Summary of deposition Testimony to be offered by deft at trial.
12/12/86	45	Fld. pltffs notice of deposition of CIC Union Europeene by Serge Bellanger on 12/16/86. S.J.
12/19/86	46	Fld. Memorandum of law in support of pltff's motion for admission into evidence of Telexes from other banks to Citibank.

Date	Nr.	PROCEEDINGS
12/15/86	—	NON JURY TRIAL BEGUN
12/16/86	—	NON JURY TRIAL CONTINUED, 12/17, 12/18
12/19/86	—	NON JURY TRIAL CONTINUED & CONCLUDED. Decision Reversed.
1/9/87	47	Fld. Memorandum of law of Federal Reserve Bank of N.Y. as Amicus Curiae.
1/12/87	48	Fld. Brief of the New York Clearing House Association as Amicus Curiae.
1/30/87	49	Fld. Pltffs post trial brief in support of judgment for breach of contract.
2/4/87	50	Fld. Institute of Foreign Bankers, Inc. Notice of Motion, for leave to participate in this action as amicus curiae & to file a memorandum in the form submitted herewith, ret; 2/6/87
2/4/87	51	Fld. Mmeorandum of the Institute of Foreign Bankers, Inc. in support of The N.Y. clearing house association's amicus curiae brief.
2/9/87	52	Fld. Pltff Wells Fargo Asia Limited's proposed findings of fact & conclusions of
2/9/87	53	Fld. Pltffs opposition to the motion of the institute of Foreign Bankers, for leave to file a memorandum in support of the Amicus Curiae Brief of New York Clearing House A-sociation.
2/10/87	—	Fld. Memo-Endorsed on doc. #50, that the motion is granted. Knapp, J cm
2-19-87	54	Filed transcript of record of proceedings dated Dec. 15, 16, 17-1986.
2-19-87	55	Filed transcript of record of proceedings dated Dec. 18, 19, 1986

Date	Nr.	PROCEEDINGS
?/?/87	56	Fld. Citibank's Post Trial Brief.
4/14/87	57	Fld. pltff's Affdvt of Edwin E. McAmis, In Re: exhibits referred to in reply to deft Citibank's Post trial brief otd 4/14/87.
4/14/87	58	Fld. Pltffs reply to deft Citibank's post trial brief.
5/29/87	59	Fld. Memorandum & Order, that the pltff submit an appropriate judgment on 10 days notice, etc. . . Knapp, J cmc & copy sent to O&A
6-2-87	60	Filed transcript of record of proceedings dated 4-27-87
7/6/87	61	Fld. Citibank's Memorandum of law in support of Counter Notice of Settlement.
7-07-87	62	Fld. Judgment #87,1250 Plaintiff Wells Fargo Asia Limited rec from defendant Citibank, N.A. the sum of $1,066,000.00 with interest thereon from the date hereof, at the rate provided by law, plus all costs of this action. So Ordered Knapp, J. MC
7-09-87	63	Fld. Memorandum & Order—The court has signed the proposed jt submitted by the plaintiff, The court accepts the introductory paragraph of defendant's proposed judgment, together with its —— of law in support thereof, as a motion for reargument of its Memo. & Order dated May 28, 1987 for the purpose of clarifying the same. The court denies that motion as unnecessary. So Ordered Knapp, J.
08-05-87	64	Filed deft.'s notice of appeal from the judgment entered in this action on 7-7-87. Mailed copies to Sherman & Sterling, 153 East 53rd St, NYC 10022. Edwin E McAmis, Esq., Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, NY.

Date	Nr.	PROCEEDINGS
08-06-87	—	Forwarded copy of notice of appeal to District Judge and copy of notice of appeal and docket entries to Court of Appeals.
8-31-87	65	Fld. Stip. & Order granting that execution of this judgment in action be and hereby is stayed to the extend provided in such intertaking. So ordered Knapp, J.
9-17-87	56	Fld. Attorneys Notice of Address Change.
9-24-87	67	Fld. Notice that original record of appeal has been transmitted to the USCA 2nd Circuit on 9-24-87. RFG
9-29-87	68	Fld. Stip. & Order, it is hereby stipulated that the listed trial exhibits shall be deemed part of the record on appeal in the action. So Ordered Knapp, J. RFG
9-30-87	69	Fld. stip. & Order that documents listed shall be substituted for documents originally filed with the district court, and that are mi. So Ordered Knapp. J. RFG
10-2-87	70	Fld. Notice that 1st Supplemental Record of appeal has been transmitted to the USCA 2nd. Cir. on 10-2-87. RFG
10-20-87	71	Fld. True Copy of Order and Mandate by both parties that the appeal is hereby withdrawn from active consideration by the Court, withdrawal to be without prejudice to a reinstatement of the appeal by any party so notifying the Clerk in writing by 11-2-87. Withdrawal of the appeal from active consideration shall not operate as a dismissal of the appeal. So Ordered Clerk USCA (copy of first page sent to chambers, second page to O&A) RFG

Date	Nr.	PROCEEDINGS
11-2-87	72	Fld. Notice that 2nd Supplemental Record of appeal has been transmitted to the U.S. Court of Appeals for the 2nd. Circuit on 10-2-87. RFG
11-9-87	73	Fld. True Copy of Notice of Reinstatement of Appeal to USCA 2nd Cir. Citibank hereby reinstates the appeal purs. to the order filed 10-7-87, withdrawing the appeal from active consideration by the Court without prejudice to reinstatement. Clerk USCA (Copies sent to chambers and O&A) RFG
4-22-88	74	Fld memo and order, that no amended judgment is appropriate and reaffirm the one previously entered and the foregoing shall constitute our supplemental findings of fact and conclusions of law. The clerk is directed to certify this memo and order to the court of Appeals. KNAPP, J. CM LA
4-25-88	75	Fld memo and order, that the annexed letters are made part of the record. The clerk is directed to certify this document to the court of Appeals. KNAPP, J. cmc
4-26-88	76	FLD. True copy of USCA (MANDATE) from the Second Circuit N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court. cm-sent ot chambers. cm 4-26-88. NOTE THAT THIS CASE SHOULD BE REMANDED TO the district court for the limited purpose of making supplemental findings of fact and conclusions of law. HHL
4-28-88	77	Fld notice that 3rd supplemental record of appeal has been transmitted to the USCA second circuit on Air 28, 1988 LA

Date	Nr.	PROCEEDINGS
10-7-88	73	Fld true copy of opinion, order and statement of costs from the USCA 2nd Circuit ordered that the judgment of the USDC-SDNY is affirmed . . . ELAINE B. GOLDSMITH, clerk EOD 10-11-88 cm LA
11-3-88	79	Fld bill of costs added to judgment #87,1250, judgment entered against deft affirmed on 7-12-88 by 2nd Circuit . . . the clerk is to tax in a total amount of $10,787.26. RAYMOND F. BURGHART, CLERK LA
11-9-88	80	Fld pltffs notice of taxation of costs. LA

COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87-7685

DOCKET ENTRIES

Date	PROCEEDINGS
08-14-87	Copy of notice of appeal and district court docket entries on behalf of Appellant CITIBANK, N.A. filed
08-14-87	Copy of receipt re: Payment of the docketing fee in the district court filed
08-17-87	Appellant CITIBANK N.A. Form C filed (w/pfs) (w/copy of dt. ct. memo & order and judgment)
08-17-87	Appellant CITIBANK N.A. From D filed
8-24-87	Scheduling Order #1 filed [P.C. September 17, 1987 at 11:30 AM]
8-27-87	Appellee WELLS FARGO ASIA LIMITED counter designation of reporters transcript *received* (w/pfs)
8-31-87	Appellee WELLS FARGO ASIA LIMITED cross designation of exhibits *received* (w/pfs)
9-24-87	Record on appeal filed (original papers and transcripts of district court)
10/2/87	First supplemental record on appeal filed.
10-7-87	Order withdrawing appeal without prejudice to a reinstatement of the appeal by any party so notifying the Clerk in writing by Nov. 2, 1987. If not thus reinstated, the appeal shall be deemed withdrawn with prejudice. Withdrawal of the appeal from active consideration shall not operate as a dismissal of the appeal under FRAP 42(b) FILED

Date	PROCEEDINGS
10-7-87	Certified copy of order withdrawing appeal issued.
10-28-87	Notice of Reinstatement pursuant to the Order of October 7, 1987 filed.
11-04-87	Certified Copy of Notice of Reinstatement issued to District Court (SDNY).
11-4-87	Second supplemental record on appeal filed. (received on 11-2-87)
11-17-87	Scheduling Order #2 filed.
11-16-87	Appellant CITIBANK disclosure of interested parties *received*
11-16-87	Appellant CITIBANK brief filed (w/pfs)
11-16-87	Appellant CITIBANK joint appendix filed (w/pfs)
11-16-87	Appellant CITIBANK Addendum of foreign law filed (w/pfs)
11-16-87	Appellant CITIBANK letter consenting to an amicus brief filed
11-16-87	Appellant WELLS FARGO ASIA LIMITED letter consenting to an amicus brief filed
11-16-87	Amicus Curiae THE NEW YORK CLEARING HOUSE ASSOCIATION et ano brief filed (w/pfs)
11-23-87	Amicus Curiae UNITED STATES—brief filed (w/pfs)
11-24-87	Appellee WELLS FARGO ASIS, LTD motion for admission to Bar Pro Hac Vice FILED (w/pfs)
11-30-87	Order granted attorney Edwin E. McAmis motion for admission to Bar Pro Hac Vice filed (endorsed on motion filed 11-24-87)
12-1-87	Appellee WELLS FARGO ASIA LIMITED disclosure of interested parties *received*

Date	PROCEEDINGS
12-21-87	Appellee WELLS FARGO ASIA LIMITED brief filed (w/pfs)
12-22-87	Appellee WELLS FARGO ASIA LIMITED corrected copies of briefs filed (w/pfs).
12-4-87	Appellant CITIBANKS, N.A.—reply brief filed (w/pfs)
2/1/88	Movant The NY Clearing House Ass'n and the Instiute of International Bankers motion for leave to present oral argument by amici curiae filed (w/pfs)
2/3/88	Appellee affidavit in opposition to amici's motion for oral argument filed (w/pfs)
2/9/88	Order granted amicus NY Clearing House Ass'n and the Institute of Int'l Bankers motion for leave to present oral argument to the extent that 5 minutes be allotted for oral argument filed (endorsed on motion filed 2/1/88)
2-18-88	Case heard before Timbers, Kearse, Mahoney, C. JJ.
3-21-88	Transcript of Oral Argument filed.
3/25/88	Order remanding the matter to the district court by detailed court order no opinion filed TIMBERS, C.J.
4/18/88	Mandate (for a limited).
4/28/88	Third supplemental record on appeal filed.
05-02-88	Appellant CITIBANK, N.A., letter date May 02, 1988 in re: questions posed in March 25, 1988 order and upon district court's April 22, 1988 response to Order (the "Supplemental Memorandum"). FILED (cc)
05-02-88	Appellee WELLS FARGO ASIA LIMITED letter dated May 02, 1988 as per order of March 25, 1988 and upon district court's April 22, 1988 response to that Order FILED (cc)

Date	PROCEEDINGS
5-06-88	Appellee WELLS FARGO LTD., letter dated May 06, 1988 RECEIVED (cc panel)
05-10-88	Appellant CITIBANK, N.A., letter dated May 09, 1988 in response to May 06, 1988 letter RECEIVED. (cc panel)
5-15-88	Amicus curiae USA letter dated June 14, 1988 pursuant to 28j RECEIVED (cc panel)
7-18-88	Judgment affirmed by published signed opinion (Judge Kearse)
7-18-88	Judgment filed.
8-1-88	Appellee WELL FARGO verified and itemized bill of costs received (w/pfs)
8-1-88	Appellant CITIBANK, NA petition for rehearing with suggestion for rehearing en banc filed (w/pfs)
8-1-88	Amici curiae THE N.Y. CLEARING HOUSE ASSOC. and THE INSTITUTE OF INT'L BANKERS support of the petition for rehearing with suggestion of rehearing en banc filed (w/pfs)
09-20-88	Appellee WELLS FARGO ASIA, LTD statement of costs taxed in amt. of $320.00 FILED.
9-27-88	Order denying appellant CITIBANK, NA and amicus Curiae NY CLEARING HOUSE & INSTITUTE OF INTERNATIONAL BANKERS petition for rehearing with suggestion for rehearing en banc filed.
10-4-88	Mandate (opinion, judgment, statement of costs) issued to SDNY.
10-4-88	Appellant CITIBANK, N.A. motion for recall of mandate pending petition for writ of certiorari filed (w/pfs)

Date	PROCEEDINGS
10-19-88	Order denying appellant CITIBANK, N.A. motion for recall of mandate filed (per panel)
2-8-89	Notice of filing petition for writ of certiorari for Appellant CITIBANK, N.A. dated January 25, 1989 filed Supreme Court #88-1260.
12-7-89	Certified copy order for petition for writ of certiorari for *GRANTED* Appellant CITIBANK N.A. dated December 4, 1989, Supreme Court #88-1260 filed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84-Civ.-0996

WELLS FARGO ASIA LIMITED

versus

CITIBANK, N.A.

COMPLAINT

Plaintiff Wells Fargo Asia Limited ("WFAL"), by its attorneys, Skadden, Arps, Slate, Meagher & Flom, for its complaint, alleges upon knowledge with respect to itself and its own acts and upon information and belief with respect to all other matters, as follows:

JURISDICTION

1. The jurisdiction of this Court is based upon:

(a) 12 U.S.C. § 632, in that the subject matter of this action is an international banking transaction as described therein; and

(b) 28 U.S.C. § 1332(a)(2), as this action is between a citizen of a foreign state, and a citizen of a State and the amount in controversy exceeds Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

THE PARTIES

2. Plaintiff WFAL is a bank chartered to do business by the Government of Singapore. Its headquarters is located at 801-802 Octagon, 105 Cecil Street, Singapore.

3. Defendant Citibank, N.A. ("Citibank") is a national bank chartered under the National Bank Act, 12 U.S.C. § 21 *et seq.*, with its corporate headquarters located at 399 Park Avenue, New York, New York 10022. Citibank has a branch office located at 8741 Paseo de Roxas, Makati, Metro-Manila, Philippines (the "Manila Branch").

FIRST CAUSE OF ACTION

(For Money Deposit)

4. WFAL repeats and realleges each and every allegation contained in paragraphs 1 through 3 of this Complaint as if set forth at length herein.

5. On or about June 14, 1983, pursuant to communications with the Manila Branch, WFAL deposited One Million ($1,000,000) Dollars (U.S.) with Citibank.

6. WFAL effected this deposit by causing Wells Fargo Bank International, Inc., New York ("WFBI") to pay said amount to Citibank in New York.

7. WFAL's deposit was a time deposit maturing on December 9, 1983, accruing interest at the rate of ten (10%) percent per annum.

8. On December 9, 1983, said deposit matured and there became due and owing the principal sum of One Million ($1,000,000) Dollars together with interest thereon at the rate of ten (10%) percent per annum.

9. Pursuant to WFAL's agreement with defendant, the principal and interest were to be paid upon maturity in New York, by Citibank's transferring the full amount to WFAL's account at WFBI.

10. On or about December 14, 1983, WFAL demanded payment of principal and interest on said deposit. Defendant paid to WFAL the interest on the deposit through December 9, 1983, but has refused and continues to refuse to repay the plaintiff the principal amount and further interest. Accordingly, defendant owes WFAL the principal sum of One Million ($1,000,000) Dollars together with interest thereon from December 10, 1983 until paid.

SECOND CAUSE OF ACTION

(For Money on Deposit)

11. WFAL repeats and realleges each and every allegation contained in paragraphs 1 through 10 of this Complaint as if set forth at length herein.

12. On or about June 14, 1983, pursuant to communications with the Manila Branch, WFAL deposited One Million ($1,000,000) Dollars (U.S.) with Citibank.

13. WFAL effected this deposit by causing WFBI to pay said amount to Citibank in New York.

14. WFAL's deposit was a time deposit maturing on December 12, 1983, accruing interest at the rate of ten (10%) percent per annum.

15. On December 12, 1983, said deposit matured and there became due and owing the principal sum of One Million ($1,000,000) Dollars together with interest thereon at the rate of ten (10%) percent per annum.

16. Pursuant to WFAL's agreement with the defendant, the principal and interest were to be paid upon maturity in New York, by Citibank's transferring the full amount to WFAL's account at WFBI.

17. On or about December 14, 1983, WFAL demanded payment of principal and interest on said deposit. Defendant has paid to WFAL the interest on the deposit through December 12, 1983, but has refused and continues to refuse to pay the plaintiff the principal amount and further interest. Accordingly, defendant owes WFAL the principal sum of One Million ($1,000,000) Dollars,

together with interest thereon from December 13, 1983 until paid.

WHEREFORE, plaintiff Wells Fargo Asia Limited demands judgment as follows:

A. One Million ($1,000,000) Dollars in damages together with interest on One Million ($1,000,000) Dollars from December 10, 1983 until paid;

B. One Million ($1,000,000) Dollars in damages together with interest on One Million ($1,000,000) Dollars from December 13, 1983 until paid.

C. Costs and disbursements, including reasonable attorneys' fees, in connection with this action; and

D. Such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 10, 1984

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM

By: /s/ A. E. McGinnis
(A Member of the Firm)
Attorneys for Plaintiff
919 Third Avenue
New York, New York 10022
(212) 371-6000

Of Counsel:

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Spear Street Tower
One Market Plaza
San Francisco, California 94105
(415) 442-0700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84-Civ.-0996

WELLS FARGO ASIA LIMITED

versus

CITIBANK, N.A.

ANSWER

Defendant Citibank, N.A. answers the Complaint as follows:

1. It submits to the court the legal conclusions contained in paragraph 1, except that it admits that this action arises out of transactions involving international or foreign banking and that the amount in controversy exceeds $10,000.00 exclusive of interest and costs.

2. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in pargaraph 2.

3. It admits the allegations of paragraph 3.

4. It denies the allegations of paragraph 5, except it admits that on or about June 14, 1983, Wells Fargo Asia Limited ("WF Asia") made a U.S. Dollar one million ($1,000,000) deposit with Citibank's branch in Manila ("Citibank Manila") pursuant to communications with Citibank Manila (the "12/9/83 Deposit").

5. It denies the allegations of paragraph 6.

6. It denies the allegations of paragraph 7, except it admits that the 12/9/83 Deposit was a time deposit which matured on December 9, 1983 and accrued interest at a rate of ten (10%) percent per annum.

7. It denies the allegations of paragraph 8.

8. It denies the allegations of paragraph 9.

9. It denies the allegations of paragraph 10, except it admits that on or about December 14, 1983 WF Asia demanded that Citibank Manila repay principal and interest on the 12/9/83 Deposit.

10. It denies the allegations of paragraph 12, except it admits that on or about June 14, 1983, WF Asia made a U.S. Dollar one million ($1,000,000) deposit with Citibank Manila pursuant to communications with Citibank Manila (the "12/12/83 Deposit").

11. It denies the allegations of paragraph 13.

12. It denies the allegations of paragraph 14, except it admits that the 12/12/83 Deposit was a time deposit which matured on December 12, 1983 and accured interest at a rate of ten (10%) percent per annum.

13. It denies the allegations of paragraph 15.

14. It denies the allegations of paragraph 16.

15. It denies the allegations of paragraph 17, except it admits that on or about December 14, 1983 WF Asia demanded that Citibank Manila repay principal and interest on the 12/12/83 Deposit.

FIRST DEFENSE

16. The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

17. The 12/9/83 and 12/12/83 Deposits referred to in paragraphs 4 and 10 hereof were and are governed by Philippine law.

18. On information and belief, on October 15, 1983, the Central Bank of Philippines issued Memorandum to Authorized Agent Banks ("MAAB") No. 47. MAAB No. 47 requires prior Central Bank approval for "any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions. . . ."

19. Citibank Manila, as a banking entity licensed to do business in the Philippines, is an authorized agent bank which MAAB No. 47 applies.

20. Pursuant to the deposit arrangements referred to in paragraphs 4 and 10 hereof, Citibank Manila agreed to remit U.S. Dollars when due to WF Asia representing the principal amount of such deposits plus interest.

21. Citibank Manila has not received approval from the Central Bank of the Philippines to remit the full amount of principal due in respect of the 12/9/83 and 12/12/83 Deposits referred to in paragraphs 4 and 10 hereof.

22. MAAB No. 47 prevents Citibank Manila from remitting the full amount of principal due in respect of the 12/9/83 and 12/12/83 Deposits until approved by the Central Bank of the Philippines.

23. MAAB No. 47 is an act of the Republic of the Philippines.

THIRD DEFENSE

24. Citibank repeats and realleges paragraphs 17 through 22 of this Answer.

25. MAAB No. 47 excuses Citibank's performance of the deposit arrangements referred to in paragraphs 4 and 10 hereof.

FOURTH DEFENSE

26. Citibank repeats and realleges paragraphs 17 through 22 of this Answer.

27. WF Asia assumed the risk of the application of repayment conditions, like MAAB No. 47, to its Philippine deposits.

WHEREFORE, Citibank demands judgment dismissing the Complaint, together with the costs of this action, and such other and further relief as may be appropriate.

Dated: New York, New York
April 27, 1984

SHEARMAN & STERLING

By: /s/ [Illegible]
A Member of the Firm
Attorneys for Defendant
Citibank, N.A.
53 Wall Street
New York, New York 10005
(212) 483-1000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 0996 (WK)

WELLS FARGO ASIA LIMITED,
Plaintiff,

-against-

CITIBANK, N.A.,
Defendant.

STIPULATION OF FACTS AND THE AUTHENTICITY AND ADMISSIBILITY OF CERTAIN DOCUMENTS

WHEREAS trial of this case is scheduled to begin on December 15, 1986, plaintiff Wells Fargo Asia Limited ("WFAL") and defendant Citibank, N.A. ("Citibank") hereby stipulate and agree as follows:

The Parties

1. WFAL at all relevant times was a bank organized under the laws of Singapore with its principal office in Singapore. At all relevant times, WFAL was a wholly-owned subsidiary of Wells Fargo Bank, National Association ("Wells Fargo"), a United States national banking association with its principal place of business in San Francissco, California.

2. Citibank is, and at all relevant times was a United States national banking association with its principal place of business in New York, New York. At all relevant times Citibank had a branch office located at 8741 Paseo de Roxas, Makai, Manila, Philippines (the "Manila branch").

3. Citibank does not dispute WFAL's representation that in 1984 WFAL's claim in this action was transferred to Wells Fargo Latin-American Bank-Cayman Islands Limited, a wholly-owned subsidiary of Wells

Fargo. On April 24, 1984 the parties stipulated that such transfer would be without prejudice to WFAL's claim and that this litigation would be conducted as if such transfer had not accurred.

The Deposits

4. The terms of the deposits at issue in this case (the "Deposits") were established on June 10, 1983 and confirmed in communications directly between the parties and also through Astley & Pearce (PTE) Limited, a money broker with offices in Singapore ("A&P (Singapore)") and Astley & Pearce-Asean, Inc., a money broker with offices in Manila ((A&P (Manila)").

5. The principal amount of the Deposits was not paid on their respective maturity dates. Shortly thereafter WFAL demanded repayment of the Deposits.

6. On December 8, 9 and 29, 1983, WFAL sent to Citibank at its Manila branch three telexes demanding payment of the Deposits. Documents Bates stamped 618, 627 and 647 are copies of these telexes. The authenticity and admissibility of these documents are hereby stipulated.

The Confirmations

7. Employees working at Citibank's Manila branch prepared and sent to WFAL written confirmations with respect to the Deposits. These confirmations are identified as Bates 377, 381, 3186, and 655 and their authenicity and admissibility are hereby stipulated.

8. WFAL sent to Citibank at its Manila branch written confirmations with respect to the Deposits. These confirmations are identified as Bates 375 and 379 and their authenticity and admissibility are hereby stipulated.

9. A&P (Manila) prepared and sent to Citibank at its Manila branch written confirmations regarding the

Deposits. These confirmations are the documents Bates stamped 2 and 15 and their authenticity and admissibility are hereby stipulated.

10. A&P (Singapore) prepared and sent to WFAL a written confirmation regarding the Deposits. This confirmation is identified as document Bates stamped 76 and its authenticity and admissibility are hereby stipulated.

11. Prior to the placement of the Deposits, there were no oral or written communications directly between the parties or through A&P (Manila) or A&P (Singapore) concerning the terms and conditions contained in the "separate leaf attachment" referred to in the confirmations document Bates stamped 377, 381, 3186, 655, 375, 379, 2, 15 and 76.

12. Prior to the placement of the Deposits, there were no oral or written communications regarding the Deposits between the parties through any third parties other than A&P (Manila) or A&P (Singapore).

Interest Rates

13. The parties to the deposit contracts at issue herein (the "parties") agreed that interest on the Deposits would be paid at the rate of 10 percent per annum.

14. The document Bates stamped 102, 105 and 106 is a copy of a publication by Reuters Financial News Service ("Reuters"). This document was produced by Citibank in this litigation.

15. The document Bates stamped 490 is a copy of a publication by Garvin Guybutler Corporation. This document was found in Wells Fargo's files and was produced in this litigation.

16. The document Bates stamped 625 is a copy of a telex communication between the parties. The authenticity and admissibility of this document are hereby stipulated.

Transfer Of Funds

17. The parties expected that the Deposits would be cleared through the Clearing House Interbank Payments System ("CHIPS"). CHIPS frequently is used to clear U.S. dollar interbank deposits.

18. CHIPS is a computerized clearing system operated by the New York Clearing House. The transfer of funds is effected through CHIPS by debiting and crediting accounts with banks that are members of CHIPS.

The Philippine Moratorium

19. The document Bates stamped 3387-3392 is a copy of a telex sent to Citibank, the substance of which was also telexed to other members of the international banking community, by the then Finance Minister of the Philippines and the then Governor of the Philippine Central Bank on or about October 15, 1983. The authenticity and admissibility of this document are hereby stipulated.

20. The document Bates stamped 3349 is a copy of a "Memorandum to Authorized Agent Banks" ("MAAB No. 47") issued by the Philippine Central Bank on or about October 17, 1983. The authenticity and admissibility of this document are hereby stipulated.

21. The document Bates stamped 3325-3327 is a copy of a telex to various Citibank officers around the world from Citibank's New York office of International Public Affairs. The authenticity and admissibility of this document are hereby stipulated.

Requests for Approval To Repay

22. On or about December 8, 1983 A.M.V. Jalandoni, an employee at Citibank's Manila office, sent WFAL a telex, a copy of which is identified as Bates 629. The authenticity and admissibility of this document are hereby stipulated.

23. The documents Bates stamped 109-114 are copies of written communications between Raphael Buenaventura, an officer of Citibank at its Manila branch, and the Philippine Central Bank. The authenticity and admissibility of these documents are hereby stipulated.

24. The documents Bates stamped 109, 112, and 114 are the only written request to date submitted to the Philippine Central Bank by Citibank's Manila branch seeking permission to repay principal of deposits purportedly covered by MAAB No. 47.

25. The principal amount of the Deposits was U.S. $2 million. Of that, $934,000 has been repaid. WFAL's damage claim herein is for $1,066,000, the unpaid principal amount of the Deposits.

26. Citibank has funds available in the form of non-Philippine assets in excess of the unpaid principal amount of the Deposits.

Miscellaneous

27. The document Bates stamped 895 is an excerpt from the Wells Fargo International Banking Group Manual. The authenticity of this document is hereby stipulated.

28. The documents Bates stamped 2361, 2270, 2243, 2215 and 02184 are reports entitled "Outstanding Deposits by Country". These documents came from WFAL's files and were produced in this litigation.

29. The documents Bates stamped 2362, 2254, 2227, 2198, and 02306 are reports entitled "Phase 1, Country Credit Exposure". These documents came from WFAL's files and were produced in this litigation.

30. The document Bates stamped 2351-2355 is a copy of a report entitled "Country Exposure Report" prepared by Wells Fargo.

31. The documents Bates stamped 781-782 and 895-898 are copies of excerpts from Wells Fargo's Interna-

tional Banking Group Credit Policy manual. The authenticity of these documents is hereby stipulated.

32. The document Bates stamped 2151 is a copy of a report. This document came from WFAL's files and was produced in this litigation.

33. The document Bates stamped 44 is a copy of a telex authored by Clay Cole and Chan Siong Cheong and sent to Citibank at its Manila branch on or about December 12, 1983. The authenticity and admissibility of this document are hereby stipulated.

34. The document Bates stamped 43 is a copy of a telex authored by Chan Siong Cheong and sent to Citibank at its Manila branch on or about December 13, 1983. The authenticity and admissibility of this document are hereby stipulated.

35. The document Bates stamped 617 is a copy of a telex authored by Tom Boughey and Hans Hildebrandt and sent to Clay Cole on or about December 15, 1983. The authenticity of this document is hereby stipulated.

36. The document Bates stamped 615-616 is a copy of a telex authored by Clay Cole and sent to Tom Boughey and Hans Hildebrandt on or about December 15, 1983. The authenticity of this document is hereby stipulated.

37. The document Bates stamped 491-498 and 501-509 is a redacted copy of the minutes of a meeting of the board of directors of WFAL held on March 18, 1982. The authenticity of this document is hereby stipulated. The admissibility of the pages Bates stamped 491-498 is also hereby stipulated.

38. The document Bates stamped 576-578 is a redacted copy of a list of WFAL's Deposit Placement Limits for major money center banks as of February 2, 1984. The authenticity of this document is hereby stipulated.

39. The document Bates stamped 598 is a copy of a telex authored by Clay Cole and sent to the designated

recipients on or about December 16, 1983. The authenticity of this document is hereby stipulated.

40. The documents Bates stamped 1793-1795 is a copy of a memorandum authored by Brian Groom on or about October 30, 1975. The authenticity of this document is hereby stipulated.

41. Bank of America, NT&SA, is, and was in 1983, a United States national banking association with its principal place of business in San Francisco.

42. The document Bates stamped 601-602 is a copy of a telex from Clay Cole to Hans Hildebrandt. The authenticity and admissibility of this document are hereby stipulated.

43. Chartered Bank is, and was in 1983, a non-Philippine bank with a branch office in Manila, Philippines.

44. Hong Kong and Shanghai Bank is, and was in 1983, a non-Philippine bank with a branch office in Manila, Philippines.

45. The documents Bates stamped 3259-3260 and 3200-3204 are copies of memoranda and correspondence between the designated persons. The authenticity of these documents is hereby stipulated.

46. The documents Bates stamped 0153, 0196, 0219, 0306, 0337, 0380, 0943, 0968, 1115, 1175, 1281, 1448 and 1540 are copies of telexes regarding MAAB 47 that were produced by Citibank in this litigation. The authenticity of these telexes is hereby stipulated.

47. The documents Bates stamped 0153, 0191, 0424, 0758, 0935, 1446, 1479, 1470, 1750 are copies of telexes sent after the Philippine moratorium was imposed that were produced by Citibank in this litigation. The authenticity of these telexes is hereby stipulated.

48. The documents Bates stamped 1521, 1517, 1505, 1567, 1559, 1555, 0539, 1568, 0535, 0531, 1667, 1661,

1633, 1620, 1708, 1753, 1751, 1749, 1726, 1770, 1768, 1798, 1777, 0130, 0182, 0165, 0148, 0145, 0201, 0194, 0259, 0257, 0255, 0227, 0220, 0347, 0311, 0385, 0423, 0408, 0457, 0439, 0524, 0507, 0473, 0468, 0529, 1444, 1438, 1432, 1416, 0592, 0590, 0581, 0579, 0623, 0169, 0629, 0763, 0711, 0792, 0307, 0781, 0776, 0822, 0819, 0803, 0886, 0885, 0867, 0901, 0896, 0944, 0936, 0932, 0929, 0966, 0964, 0961, 0952, 1107, 1173, 1170, 1167, 1119, 1197, 1195, 1186, 1222, 1214, 1249, 1247, 1372, 1384, 1475 and 1474 are copies of certain documents received by Citibank at its Manila branch and produced by Citibank in this litigation.

49. The document Bates stamped 4252 is a copy of a page from a Citicorp Policy Manual dated August 1983. The authenticity of this document is hereby stipulated.

50. The document Bates stamped 1752-1754 came from Wells Fargo's files and were produced in this litigation.

51. The document Bates stamped 674-675 is a copy of a letter dated January 13, 1984, from Patrick Mulhern, General Counsel of Citibank, to Brian Wager of Wells Fargo. The authenticity and admissibility of this document are hereby stipulated.

52. The document Bates stamped 1594-1595 is a Wells Fargo memorandum dated February 9, 1981. The authenticity of this document is hereby stipulated.

Dated: New York, New York
December 8, 1986

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MEAGHER & FLOM

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TRANSCRIPT OF SUMMARY JUDGMENT PROCEEDINGS, FEBRUARY 15, 1985 (EXCERPTS PP. 47-48)

Citibank Manila has no ability, no right, to pay a claim on Citibank Manila with the Paris branch of Citibank. It can pay with its own assets.

Now, if it defaults, if it defaults in payment of its deposit obligation without justification, then, sure,—

THE COURT: How, as a practical matter, and this a question purely out of ignorance, would the Philippine economy have been affected if Citibank New York paid off these claims?

MR. HOFFMAN: It wouldn't be affected at all if Citibank New York paid off the claims with assets outside of the Philippines, which obviously it is capable of doing. I mean, nobody is suggesting that this $150 million bank has all its assets sitting in downtown Manila. Of course it could do it. And it wouldn't have an effect on the Philippine economy whatever, unless it paid it with Philippine assets that were there.

But the question, Your Honor, is not capability of paying. It isn't whether Citibank's credit is good for a million dollar claim—

THE COURT: I am just trying to understand.

MR. HOFFMAN: Okay. I think it is very important to understand that, because this is a point where Wells Asia has really tried to mislead you by claiming that the ability to pay with non-Philippine assets is the equivalent of an obligation to pay with non-Philippine assets.

THE COURT: No, no. I am thinking of a different thing. If in fact it has no effect on the Philippine economy to pay—if Citibank New York, using its own assets, paid these people off, and that had no effect on the Philippine economy—what is there to lead me to think that, if you had written a simple letter saying "We propose to pay these assets, pay these CD's in New York with

New York assets, which will have no effect on your economy," you would have any objection?

MR. HOFFMAN: I could answer that. They wouldn't have any objection. Mr. McAmis has put in a letter that says that. That isn't the question. The question is, does Citibank have an obligation to pay out the stockholders' money on a claim that it is not obligated to honor?

* * * *

TRANSCRIPT OF ORAL ARGUMENT AT CLOSE OF TRIAL, APRIL 27, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Civ. 0996 (WK)

WELLS FARGO ASIA LIMITED,

Plaintiff,

-against-

CITIBANK, N.A.,

Defendant.

New York, New York
April 27, 1987
2:00 p.m.

Before:

HON. WHITMAN KNAPP,
District Judge

APPEARANCES

SKADDEN, ARPS, SLATE, MEAGHER & FLOM,
Attorneys for Plaintiff,
EDWIN W. MCAMIS,
MITCHELL SOCKETT,

-and-

BROBECK, PLEGER & HARRISON,
DARRILL SNIDER,
JESSICA HOOVER,
of Counsel

SHEARMAN & STERLING,
Attorneys for Defendant,
JOHN E. HOFFMAN, JR.,
HENRY WEISBURG,
JENNIFER FREEMAN,
ROBERT FISCHLER,
of Counsel

[2] (In open court)

THE COURT: Good afternoon, ladies and gentlemen. This matter is not wholly unfamiliar to me. I would like to make a few preliminary observations.

In the first place, I want to make clear I didn't decide anything when I denied the motion for summary judgment. All I said at page 355 is that if Wells Fargo is correct in its interpretation of the law that Citibank as an institution is liable for the deposit that a question of fact would arise.

I am a great disbeliever in deciding anything I don't have to decide. At that point all I had to decide was that if Wells Fargo was right there was a question of fact. Now, unhappily, I see no way of getting around deciding it.

One of my law clerks who now works for Skadden, Arps had a motto which I go by very religiously: God takes care of the lazy.

But I can be lazy no longer. I have got to decide the question.

Before we get to that, I would like to make a few observations on matters that we discussed at the trial. You remember that footnote 2 of my opinion, I mentioned that it was highly relevant on the question of trade or custom whether or not all your dollar deposits [3] commanded the same rate of interest when a deposit was made in London, whether or not it would carry the same interest as one made in Manila whereas the risk was considerable.

It seems to me I am bound to find as a fact that the rate was identical. I was quite persuaded by the testimony of Dr. Duffy which was substantially uncontradicted, although Citibank clearly had it in its power to refute that testimony if the facts were otherwise. Citibank could easily have produced documentary evidence that on certain days or weeks deposits were received in London at lower rates than Manila.

Citibank knew about this problem at least since the publication of the opinion and has come up with no such evidence.

I can therefore only conclude that it does not exist. Citibank's observations at page 65 read that it often paid less than market rate is wholly irrelevant. While the observation is probably true, after all Citibank has a reputation and its reputation is probably accurate of being one of the most sovereign banks in the world, so quite possibly it is probable that it got a lower rate than its competitors. Presumably, it got a lower rate both in London and Manila. At least there is no evidence [4] to the contrary.

It seems to me that Citibank must have known, having found the fact that the interest rate was identical, Citibank must have known it, and it must have known that its depositors were not taking any sovereign risk, or didn't think they were.

And that is borne out to some extent by the letter that Citibank wrote to the plaintiff long before this litigation started, offering as I recollect a percentage and a half extra rate, extra interest for the assumption of sovereign risk.

Obviously, whoever wrote that letter didn't think that plaintiff had assumed sovereign risk before they wrote that letter. Anybody thinking so would have offered to increase the interest rate because the sovereign risk got worse than they expected. But they wouldn't offer to give them an increased interest rate to assume a risk that they had already assumed.

However, that identity of interest rate cannot be conclusive, because obviously whether they liked it or not they were adopting some sovereign risk. For example, the Fifth Circuit case dealing with a Canadian deposit establishes if the Philippines had imposed a tax on this deposit—of course I don't have to decide this because it is not there, but it seems to be clear [5] that under

the Fifth Circuit case—you know what I am talking about, I don't remember the name of the case.

MR. HOFFMAN: The Dunn case, your Honor.

THE COURT: That is right. If the Philippines had imposed a tax on the deposit that would have reduced it pro tanto and that would have stopped the risk.

Also I would assume that if the Philippines had asserted a claim against the plaintiff and litigated that claim to the satisfaction of Philippine law they would have attached the deposit in Manila. And I also assume that if they had expropriated the deposit that would have been the defense.

However, it seems to me that I have to proceed on the assumption that the interest rate was identical in Manila and London.

A question I would like to ask Wells Fargo is what sense does Treasury Regulation D make if that position is correct, because the mere fact that the Treasury makes a ruling that does not make any sense, I don't like to conclude that that is so. Under Regulation D if Citibank in its deposit guaranteed the deposit, then they would have had to have subjected it to reserve requirements whereas if they didn't guarantee it I don't see that it makes a damn bit of [6] difference whether they guaranteed it or not. Therefore, it doesn't seem to make any sense.

The question I would like to ask Citibank is why they so jealously guarded—almost like a trade secret—their belief that everybody was taking sovereign risk. Mr. Howard, the chief financial officer, testified with almost religious zeal that that was the fact, but unlike most religious zealots he didn't try to proselytize his beliefs. The only thing is that people who specifically asked got the information.

There is no suggestion in the record that anybody who ever got that information ever made a deposit except for London.

Again I want to emphasize that I can't see how this decision is going to be anything different than the decision which I think it was Justice Roberts who characterized the Supreme Court's conduct in his day that decisions were only like an excursion ticket, only good on this train and date.

I think this decision binds these parties and nobody else in the world. And if I can go along on the idea that Philippine law is controlling, that will even narrow the decision further.

Actually, I am not saying anything about what would be the law if Citibank had adopted—or what is [7] the law now in the light of Citibank's new confirmation slips. Although it is not for me to practice law and tell you how to do things, it seems to me that it would be a dead cinch, you are dealing with a very small number of people, small number of banks, small number of brokers, and it seems to me that it would be a dead cinch for Citibank to publish their views in such a way that no one in that small community could realistically say he wasn't aware of it when making a deposit.

Anyway, those are just observations. Fortunately, or unfortunately—depending on how you look at it—I had two jury case cancellations last week so I spent it re-reading all the cases which may have not made me any wiser but it has made me a little better informed.

So have you decided among yourselves what order you want to speak?

MR. HOFFMAN: I assume that Wells Fargo will go first, your Honor.

MR. SNIDER: We are prepared to, your Honor.

THE COURT: You came the farthest so you are entitled to first speak.

MR. SNIDER: Thank you, your Honor.

Actually, it is good to be back in New York after having been here in December with your Honor.

[8] Your Honor, Darril Snider and Jessica Hoover are here representing Wells Fargo Limited along with Ed McAmis and Mitch Sockett in New York.

Your Honor, I have prepared a very brief argument which I could go into and then in the course of that of course I will answer your Honor's questions as well as any other questions that you might have. Shall I proceed on that basis?

THE COURT: Please.

MR. SNIDER: Citibank's brief largely addresses the question of whether Philippine law applies or the issue of whether the deposits were subject to Philippine law, as if that were the end of the analysis.

But, your Honor, that is only the beginning, not the end of the analysis. The question is, here: If we assume that Philippine law applies, if we assume that MAAB 47, this decree applies, does it in fact, and as a matter of what does it prohibit for payment, Citibank relies exclusively on this Philippine decree adopted in October 1983 as its excuse for non-performance, for not paying its deposits upon maturity.

As WAFL has maintained throughout its briefs and the trial of this case, even if we assume that MAAB 47 applies, there are two independent bases for this Court's entry of judgment in WAFL's favor.

[9] I would like to identify those two branches of the argument, each of which are sufficient to enter judgment in Fargo's favor.

First, there is no evidence in the record that suggests that their Philippine decree, MAAB 47 does prohibit repayment of deposits by Citibank in Manila or anywhere else with funds from Citibank's non-Philippine offices. It follows from this that Citibank is obligated to repay the deposits since there was no express or implied term limiting repayment to those Citibank funds which were at its Manila branch. That is our first argument and I would like to describe the second argument and then come back and look a little more closely at the first argument.

Second, your Honor, again assuming that Philippine law or MAAB 47 applies, and assuming further that MAAB 47 did in fact prohibit repayment of the deposits

in Manila, then under well settled principles of contract law both in New York or the Philippines, it doesn't make any difference, Citibank still cannot establish its affirmative defense that impossibility of performance at the Manila branch excused Citibank, the institution from repaying these deposits, which was its obligation.

So we now have two independent branches [10] to our argument. The first is what we called in our opening brief, the missing link, there is no nexus, your Honor, between what MAAB 47 provides on the one hand and what Citibank is obligated to do as a matter of appropriate and contract law on the other.

Our second argument is, following Vishipco and that line of cases, that even if MAAB 47 did prohibit repayment in Manila, which we say it did not, they cannot establish the impossibility defense. Therefore Citibank is still liable under the deposit contracts.

Let me begin more closely with this first argument. There are two questions which the Court must address and resolve in connection with WAFL's first argument. The first question is, does this Philippine decree, MAAB 47 in fact prohibit repayment of the deposits in Manila or anywhere else so long as Citibank uses funds from its non-Manila offices?

In that connection, your Honor, first of all we have Plaintiff's Exhibits 18 and 19, the request from Citibank for authorization to repay, and then the authorization from the Central Bank authorizing repayment of the 46 percent as long as Citibank did not use its funds from the Philippine offices.

We say that that supports, your Honor, a position that shows that the Central Bank and this [11] decree did not in fact prohibit repayment in Manila as long as non-Philippine funds were used.

Secondly, we have Plaintiff's Exhibit 59 which is the December 14, 1984 telex from the Central Bank to WAFL. And in that telex the Central Bank itself when finally asked the questions, and Citibank never asked,

when finally asked the question, do you object to Citibank repaying these deposits and so on, as well as they use funds from its non-Philippine offices the answer they themselves gave was no, we do not object. That will not violate the decree.

Finally, we have the affidavit of Gregorio Castillo, Plaintiff's Exhibit 63, received in evidence and Mr. Castillo's interpreting Philippine law confirms that MAAB 47 does not prohibit repayment with Citibank's other non-Philippine assets.

In other words, your Honor, nothing that the Philippine government did here prevents Citibank from repaying these deposits. So we can talk a long time about sovereign risk and about whether Philippine law applies.

But the question is: Once we apply Philippine law, we are saying, go ahead apply it, your Honor, for purposes of this argument, once you apply it it does not prohibit payment. So it is different from the seizure [12] cases and some of the other cases once you apply the foreign law of the country where it is located it would prohibit payment.

Here, it did not.

The sensible question, which must be addressed and resolved by the Court in connection with WAFL's first argument is, is Citibank, N.A., the institution obligated to repay the deposits given that it is not prohibited from doing so under MAAB 47.

And the answer to that question, of course, is Citibank is obligated to repay the deposits unless it can establish either that the express terms of the contract provided that their obligation was limited to Philippine funds or through some custom that its obligation to repay was limited to Philippine funds.

In other words, limited to those funds that are in fact covered by MAAB 47.

In the trial of this case, in December, the facts are undisputed that there are no express terms that so limit Citibank's obligation to repay and there is no custom,

your Honor, part of which is evidenced by what you cited today, but taking all the evidence the bankers testified there is no custom or evidence that the parties should have contracted with respect to limiting those payments in the [13] Philippines.

THE COURT: Couldn't I find a custom out of Regulation D?

MR. SNIDER: No, your Honor.

THE COURT: Why doesn't Regulation D in the way that it is interpreted assume that the Federal Reserve thinks that Citibank is right?

MR SNIDER: Perhaps at this point I should go right into the Reg D that you raised before I started.

THE COURT: I am inclined to agree that it is not controlling but it makes me feel awkward.

MR. SNIDER: Let me answer your Honor's question this way: Reg D says nothing about repayment of funds or whether a party is excused from repayment of funds. In fact, in the 1981 interpretation which is Defendant's Exhibit R—

THE COURT: To specifically exclude that.

MR. SNIDER: And Exhibit S of the 1970 Reserve Bulletin specifically says that Reg D has nothing to do with transfer of funds or repayment of funds. It merely imposes reserve requirement on certain transactions and by the same token makes reserve free other transactions which have to be off-shore deposits.

THE COURT: There seems to be no logical reason for the distinction if Citibank is liable between [14] the one kind and the other kind.

MR. SNIDER: No logical basis for which distinction?

THE COURT: Distinguishing between this deposit and a deposit here in New York.

MR. SNIDER: Not at all, your Honor. There may well be some type of foreign sovereign risk. Take a seizure case for example, where in fact a seizure has occurred and a deposit was seized—in the foreign country—there may be some types of foreign sovereign risk, which would in fact come into play and under Reg D one could construct an argument that because the deposit is reserve free the depositor has taken some kind of foreign sovereign risk.

We don't have that situation here. The situation we have here is that MAAB 47 does not prohibit repayment. So Reg D would still be meaningful. There would still be situations where because a deposit is made offshore, the depositor does take some foreign risk.

That is one of the reasons why the Federal Reserve has adopted this policy. The other being simply—I mean we have to understand what the purpose of Reg D is. The purpose of Reg D is to allow U.S. banks to compete with foreign banks in this market [15] for off-shore deposits.

So in a case where the decree in question does not prohibit repayment, in that case it does not render Reg D meaningless.

Let me also refer your Honor to Exhibit A to our reply brief which is the opinion letter of Oliver Ireland, associate general counsel of the Federal Reserve Board of Governors. This is not just the New York Federal Reserve. We are now talking about the Board of Governors.

In that opinion Mr. Ireland advises in an informal ruling, not published, but an informal ruling advises of two things: First of all, he advises that the deposits would not be subject to reserves even if the contract provided that a bank could transfer funds from one of its other offices. As long as that payment is made at a foreign branch you could transfer the funds from Paris or London or from anywhere alse. Indeed, if the Court looks at the language of both Exhibit R and Exhibit S, the 1981 interpretation or the 1970 interpretation, it doesn't even limit it to off-shore branches. Indeed Citibank could transfer funds from New York to its Manila branch merely by having some kind of computer debit

and credit in New York and after transferring those funds would be in a position [16] to repay those deposits.

And that would not deprive these deposits of the reserve free status. That is both what the regulation tells us and that is what Mr. Ireland says in his informal rule.

So the Federal Reserve has recognized in effect that there is not a significant element of foreign sovereign risk even though it allows these deposits and off-shore branches to be reserve-free, there is not a single element of foreign sovereign risk for the reason—and this is covered again in Exhibit S—Defendant's Exhibit S and in our Exhibit A to our reply brief which is Mr. Ireland's opinion—because you can contract specifically that this will be payable in London or Paris or Manila and you could name ten or fifteen cities all of them being off-shore cities and it could be payable in any one of those cities and if that were the case, your Honor, that would have rendered the chance of there being some kind of disruption, some kind of real foreign intervention virtually impossible.

THE COURT: Why does it make any sense to make a difference if after naming all of those other cities you also name New York which would clearly make it subject—

[17] MR. SNIDER: If you name New York. But you wouldn't have to do that.

THE COURT: I know you wouldn't have to do that, but if you did it would make it subject to reserve and it wouldn't make any difference in the real world. I don't suppose you need to educate me on that. Maybe it is that I can't understand banking. But it seems to me that that distinction makes no sense. If the contract specifically says you can pay in every office throughout the world but doesn't mention New York, it is reserve-free but if it puts in the word "New York" then you have got to put reserve and there is absolutely no difference in the liability of the bank as far as I can see.

MR. SNIDER: I would agree with your Honor. But Reg D again was not intended to define liability questions. What we have going on here—

THE COURT: It was intended to reflect liability questions I would have thought in the amount of reserves you need?

MR. SNIDER: No, that is not the purpose of it.

THE COURT: I do not want to take too much time on it.

MR. SNIDER: If I could, your Honor, pick back up. [18] The second question in our first argument that I was addressing is whether Citibank, the institution, is obligated to pay the deposits even if we assume—I'm sorry, given that MAAB 47 does not prohibit such repayment. It talks about the express terms of the contract doesn't prohibit it and the implied terms does not prohibit it.

Reg D does not provide such a custom because of the analysis we just went through because these deposits could occur in any of a number of ways and the Federal Reserve Board does not purport to specify in the various ways of making these payable which would be reserve-free and which ones would not.

Just to finish up on the second question, in other words, the question of who is the entity here, Citibank Manila—in quotes—is a fiction used by the defendant to create the impression that only its foreign branch in Manila entered into these deposit contracts and only the Manila branch had the obligation to pay them at maturity.

Your Honor, that simply is not true. There is not an entity called Citibank Manila anymore than there is an entity called Citibank New York. There is Citibank N.A. and it has branches in Manila and in New York. The separate entity cases cited [19] are inadmissible here for many reasons.

First of all they are a lead letter and have been held forth in this court in the Digitrex case.

Secondly, even the old attachment cases that Citibank cites, like Blue Bird and the U.S. v. First National City Bank case, even those cases on their face say that the separate entity doctrine does not apply when a depositor sues for repayment from the institution when a branch has failed to make repayment. That is our situation.

So those old separate entity cases, which were replaced by the modern rule, would not prohibit payment here because we are the depositor and we are saying a situation where the branch refused to pay.

Finally, nothing in those separate entity cases supports the dichotomy that Citibank would draw between credit risk on the one hand and foreign risk on the other hand.

In sum, your Honor, on our first argument even if we assume that Philippine law and MAAB 47 apply, there is no connection or nexus between the operation of MAAB 47 on the one hand and Citibank's claim that it is not obligated to repay the deposits on the other hand. [20] As we said in our brief this is the missing link and it is still missing.

I would like now briefly to turn to our second argument.

In our second argument, your Honor, we assume for purposes of argument again that not only does Philippine law and MAAB 47 apply. but we further assume that it prohibits repayment in Manila. If that were true, your Honor, Citibank remains obligated to repay these payments outside the Philippine and its performance is not excused under the impossibility defense.

This argument is defended only on the application of controlling legal precedence and not on the finding of fact of the defense of impossibility. Again it is important at the outset, remember, that this result follows under either New York or Philippine law. We have both New York and Philippine law on this question. I think it is easiest if we begin with Philippine law even though, as the Court knows, in our briefs and specifically throughout the case we have maintained that New York law applies.

But even if Philippine law applies, what is the Philippine law that is before the Court. First of all, we have Gregorio Castillo's affidavit, which is Plaintiff's Exhibit 63, at paragraphs 15, 16 and [21] 17 which establishes that under Philippine law a bank is obligated to repay its obligations even where a branch cannot perform.

Now the affidavit submitted by Citibank which is Exhibit BBB only addresses the question of whether the branch is obligated to repay and whether it is impossible to repay at the branch—it does not go on to address the question whether Citibank, the institution, is obligated to pay if the branch cannot pay.

That is what is in the record on Philippine law.

Now as to New York law. Again WAFL is entitled to judgment in its favor if New York law applies on our second argument. The controlling case law in our circuit makes it clear that even if MAAB 47 prohibited repayment in Manila by Citibank funds with any of its worldwide offices, Citibank still remains obligated to its obligations outside the Philippines and it cannot justify its actions by claiming impossibility and Justice Cardoza and Crane, the Sokoloff case, as being the law applicable in this case and in this circuit—because Sokoloff is a state case—on the subject of impossibility.

Your Honor, that completes my prepared argument and I would be happy to address any other [22] questions that your Honor has with respect to the WAFL case.

THE COURT: Maybe I will reserve questions until after I have heard Mr. Hoffman.

Mr. Hoffman.

MR. HOFFMAN: Good afternoon, your Honor.

THE COURT: You ought to be an expert on this. I notice your name is in practically everything that deals with it.

MR. HOFFMAN: I would like to begin, your Honor, by stating what our position is, what the issues are in this case and how and by what facts and by what legal

authorities those issues should be resolved. Then I would like to review and highlight some of the testimony and the documentary evidence that is before the Court as they bear on the resolution of those issues. Then I will summarize our position on what findings and conclusions can be drawn from that evidence and what matters may remain uncertain.

In this context I will review the great body, the legal authority that governs these matters in the absence of an agreement of the parties.

This is a contract. That much at least we all agree on. The ultimate issue in this case is what are Citibank's legal obligations? This case is not about what Citibank might do or could do or is [23] a matter of some sort of business judgment it might make sense for them to do. But what was and is their legal obligation with respect to these deposits? Thus the case does not present the question whether Citibank officers in Manila go to jail or Citibank in Manila loses its license, which it has had for 70 years to operate branches in Manila if Citibank voluntarily settled this case or if Citibank, as it is perfectly capable of doing, satisfied a judgment against it in this litigation after trial.

The issue is what is Citibank legally obligated to do under these deposit contracts? These are special contracts; they are bank deposits, sub sub species, Eurodollar or Asia dollar deposits.

Deposits were made with the Manila branch with Citibank and this case is here because and only because the Philippine government took action to restrict payment of those deposits.

Thus there is a dominant issue that has been here from the day we filed our answer, and I submit was evident before we even filed our answer, and that issue was choice of law.

Does Philippine law apply to Citibank's obligation to repay the deposits? And if it does, the secondary issue is what consequences does that [24] Philippine law have?

We thought that it should have been uncontested that Philippine law applied and therefore the only issue would be the interpretation of the effect of that law, and that is the reason we started the declaratory judgment in the Philippines.

WAFL claimed the Philippine law was irrelevant and moved to enjoin the Philippine action asserting that New York law controlled. We worked out an accommodation with the Court's assitance where this case proceeded and proceeded, I think, on a basis of deciding the choice of law question.

The choice of law question can be decided either by reference to an agreement or a mutual understanding of the parties regarding applicable law if in fact there was an agreement or understanding and provisions of that nature common in large documentary transactions.

But in the absence of such an agreement or mutual understanding choice of law is determined by reference to established choice of law principles and legal authorities regarding the relationships at issue.

THE COURT: Mr. Snider's first proposition assumes Philippine law applied in his first argument.

MR. HOFFMAN: I understand that, your Honor. [25] I also understood that not to have been an abandonment of their original position. If it is I would be happy to take that concession and move on.

If counsel would agree that Philippine law applies—

THE COURT: They are very unconceding people.

MR. SNIDER: Your Honor, I should point out that under both our arguments we assume it applies.

MR. HOFFMAN: I took it that way, your Honor, that it was an argument he was presenting and that he wasn't waiving his claim previously.

THE COURT: I don't think he has ever waived a claim.

MR. HOFFMAN: I have tried to fish a concession out of him but I have given up trying.

So was there an agreement regarding choice of law, express or implied? Was there a meeting of the minds on the issue of choice of law? WAFL at first claimed there was and went so far as to move for summary judgment claiming an express written agreement that the deposits were payable in New York, that New York law therefore applied and Philippine law was inadmissible.

The evidence of an express agreement that [26] they referred to were references in the confirmations of the deposits to the role of the respective New York correspondents for WAFL and Citibank Manila.

We argued that those provisions did no more than identify the New York clearing banks through which payments into and out of the deposits were to be made. And we expected that WAFL understood that fact which was consistent with what we believed to be common knowledge in the international financial community that dollar transactions with minor exceptions that are not applicable, here, always clear through New York.

We recognized that the confirmations could be considered somewhat ambiguous on their face but that there was in fact a common understanding that the terms only referred to the New York clearance. Custom and usage could be relevant to resolve such an ambiguity. And in any event the provisions plainly did not establish a contractual New York choice of law agreement.

There were lots of trial testimony on the Eurodollar clearing process in the Amicus brief of the Federal Reserve Board of New York and the New York Clearing House have offered their experienced views on that subject.

The only conclusion that can be drawn from all this and what we have maintained from the outset [27] is common knowledge is that Eurodollar transactions clear through New York. But it is manifestly clear that for choice of law purposes that does not mean that all Eurodollar deposits are automatically payable in New York.

For if that were so, from the undisputed effect of the Reg D provisions there wouldn't be a Eurodollar market at all as we know it. There might be a few low rate Eurodollar deposits maintained somewhere overseas with people like the Libyans or the Cubans or the Iranians who seek to escape U.S. sovereign risk.

But otherwise, who in their right mind would place dollars with the U.S. bank in the Philippines if he could get the same rate from a U.S. Bank in the United States? The ambiguity from the confirmation provisions that may have existed at the time we were here before your Honor conducting a summary judgment argument was largely if not entirely resolved by the Second Circuit decision in the Braka case—Judge Sofaer's decision—which came down at the time of the argument and the summary judgment decision.

It is our position that Braka establishes as a matter of law that provision for New York or clearing of Eurodollar deposits do not render such deposits payable in New York for choice of law and activity purposes.

[28] As the case moved around WAFL shifted from a claim of an express written agreement to the position that there was an oral agreement with certain terms later confirmed in writing. We agree with that and submit that this is the proper characterization of one of these Eurodollar deposits.

This also is the position, as I understand it, in the New York Clearing House and the Institute of Foreign Bankers and their Micus submissions, but for their choice of law analysis nowhere was it established that there was an express agreement written or oral as to which law governs.

If there was not an express agreement was there an implied agreement, implied either by a course of dealing, by admissions by custom and usage leading to the implication of a mutual understanding of the legal and economic consequences of the relationship, or there could

also be an implied agreement derived from extrinsic evidence like the rate structure or other evidence like the manner in which the transactions were handled or accounted for?

Take the question of the parties' understanding first. There is no question about Citibank's understanding and no claim to the contrary that Citibank understood the deposits to be payable only in [29] Manila and subject to Philippine law. The testimony of Mr. Howard and Mr. Buenaventura is clear and WAFL has never claimed that Citibank had any other understanding.

But was that a mutual understanding? What about WAFL's understanding?

I submit that this trial record could support a finding that such was WAFL's understanding as well. I would refer the Court to the testimony of WAFL's director and formerly the deputy head of the Asian Pacific division of Wells Fargo, later the senior vice president in charge of that division, Mr. Wagar.

Mr. Wagar testified at his deposition on April 23rd as follows, and I would like to hand up to your Honor, I have, I think, a copy of the transcript of Mr. Wagar's deposition—

THE COURT: Have I never seen this before?

MR. HOFFMAN: Yes, your Honor. It was submitted and the sections were designated as part of the trial record, and we sent the entire transcript in to your Honor, I think, in January, shortly after the trial was over.

I would like to call your Honor's attention to page 28 and I am going to read from page 28 of the transcript starting with line 5, Mr. Fischler conducting the examination of Mr. Wagar.

[30] "Q Does the place and entity generally assume sovereign risk when it places a dollar deposit with a foreign branch of a U.S. bank?

"MR. MAJORIE: Objection.

Answer: In my opinion, yes.

"Q In such a situation what countries' sovereign risk does the placing entity assume?

"MR. MAJORIE: Objection.

Answer: Can you expand that question a little bit?

"Q Surely, let me rephrase it. When an entity places a dollar deposit with a foreign branch of a U.S. bank the sovereign risk of which country is assumed by the placing entity?

"MR. MAJORIE: Objection.

"A The country in which the unit is located.

"Q When we are dealing with a branch is the country in which the branch is located?

"A Yes.

"Q In that situation—i.e., where a dollar deposit is placed with a foreign branch of a U.S. bank is the home office obligated to return the deposit when the branch is not due for an event that would be encompassed by [31] sovereign risk?

"MR. MAJORIE: Objection.

Answer: In my opinion, no."

Then turning to page 32, your Honor, starting with line 12, questioning by Mr. Fischler:

"Q In your view, Mr. Wagar, did WAFL assume Philippine's sovereign risk when it placed the deposits at issue in this lawsuit?

"MR. MAJORIE: Objection.

"A Yes.

THE COURT: What was his position when he was testifying?

MR. HOFFMAN: He left Wells Fargo in 1984, your Honor. I think he was with them in 1983 when the deposits were made.

That is the end of my reference to that transcript, your Honor.

On this subject I would also like to refer to the evidence and testimony regarding WAFL's color code treatment of deposits which graded countries by degrees of sovereign risk, and that in WAFL's own internal record

it classified the deposits as Philippine country risk exposure, and I am referring to Defendant's Exhibits D and E.

However, I recognize that some of WAFL's [32] witnesses argued to the contrary and I certainly can't argue that WAFL's lawyer as opposed to the man that used to run that region for Wells Fargo made the concession that Mr. Wagar did.

Let me turn for a moment to the issue of custom and usage.

I submit that custom and usage is useful only insofar as it aids in a search for a mutual understanding of the parties.

The question here is—

[33] THE COURT: I think that is the only use it has, what you just said. I agree with that.

MR. HOFFMAN: Thank you, your Honor.

So the question here is was there such a custom and use that the parties knew or should have known of it and, hence, by implication agreed to it. The "it" in this instance is the choice-of-law question, the applicability of Philippine law to the deposits at issue.

The testimony, I would argue, of the trial witnesses overwhelmingly supports the finding of such a custom. I am not going to try to take time during this argument to review all of the testimony on this, other than simply to refer to what I think your Honor will recall hearing from Howard, Buenaventura, Belanse, Wagner, Gitty, or even Professor Dufay during cross-examination, he repeatedly acknowledged the existence of perception of branch host country sovereign risk.

And I would like to refer to a section of the transcript.

In that regard, referring to the trial transcript at page 248; which was a portion of my cross-examination of Professor Dufay, starting at line 10.

Does your Honor have that

THE COURT: I have it in front of me.

MR. HOFFMAN: I am reading from 648, your [34] Honor.

THE COURT: You said 248.

MR. HOFFMAN: I beg your pardon. 648. I am going to start on line 10:

"Q Bankers understand, do they not, that home office liability for branch deposits is qualified by the consideration that a bank's liability generally will be measured by the law of the jurisdiction where the foreign branch is located?

"A That is what I understand.

"Q The basis of your understanding has been your experience with bankers' activity in the Eurodollar market, correct?

"A Yes.

"Q You have talked with them have you not?

"A Yes.

"Q And you come to an understanding of their perceptions, have you not?

"A Yes."

Then I flip over to page 667 of the same volume, your Honor, starting with line 11:

"Q Thus, in international banking, the notion that the law of the jurisdiction of a foreign branch is the controlling law is regarded by many bankers as discharging a bank of liability in the event that foreign [35] deposits are frozen by the local authorities.

"Did you write that, Professor?

"A I wrote that in the broader context, yes."

That is the end of my reference to Professor Dufay at this point, your Honor.

As to that evidence, the submissions of the New York Clearing House, the Federal Reserve Bank of New York and the Institute of Foreign Bankers with their immense collective experience, and I think the record is overwhelming against all that, are five individual witnesses who testified for WAFL.

Mr. Lepicard, who came from Paris, representing the Banque du Nord also spoke of experience with the Bank of America. But what he spoke of regarding the Bank of America's position was in conflict with what we heard from Mr. Buenaventura regarding what the Bank of America actually did with Filipino deposits.

THE COURT: Of course that raises the inexplicable fact that neither of you got a witness from the Bank of America, which would have been very easy to do, and find out what they actually did, rather that speculate.

MR. HOFFMAN: Your Honor, I confess I do have a little trouble with that.

The Bank of America reported to us they didn't [36] want to testify. We came into the trial with a designated witness list where plaintiff had designated a witnesses of the Bank of America and I thought they were going to have somebody here and we would deal with it when he was here. That was not produced.

I suppose I could have subpoenaed somebody from the Bank of America, and whatever implications your Honor wants to draw from the fact that I didn't do it, I suppose you will draw.

THE COURT: I won't draw any implications against either of you, because either of you could have.

MR. HOFFMAN: Frankly, I chose to rely on what Mr. Buenaventura gave your Honor in the form of live testimony.

THE COURT: Yes, but that was hearsay of the most unreliable sort, because if I know anything about bankers—they are no different from anybody else—when they are talking to friends they say what they think friends want to hear.

MR. HOFFMAN: I think I agreed with your Honor's observation at the time that it might have been bad hearsay, but it wasn't quite as bad hearsay as what the plaintiff was offering.

THE COURT: On this issue, it certainly wasn't. But all you had to do was issue a subpoena. Both of you [37] know how to do that.

MR. HOFFMAN: Mr. Wood was called as a witness. I think in fairness to Mr. Wood, he did what a number of people have done, and I think a number of the trial witnesses and other have frequently done in this area, and that is confuse credit risk with sovereign risk.

The best illustration of that with regard to Mr. Wood's testimony was the fact that he kept talking about problems that Crocker—your Honor will remember that he worked for Crocker and that they had funding problems in London and they gave head office support when Crocker was having funding problems in London.

That same illustration is applicable to what you heard from Mr. Lepicard, who talked about the fact that the Bank of America branch, as I recall it, in Paris, had very little capital. You don't have capital under French banking regulations. People deal with that branch and they expect it to be supported by the credit of the institution at large, which, of course, is a position that we have taken all along, that Citibank is prepared to and will support the credit of the branches.

But that is a different issue from sovereign risk.

Mr. Schmidt, who came to testify, had previously worked for Marine Midland. He had never worked on the [38] liability side of the bank or had familiarity with those practices. But his testimony regarding Marine Midland's position seems to be rather in conflict with the New York City Clearing House's position of which Marine Midland is a member.

Finally, there were the two party witnesses, Mr. Cole and Mr. Bowie, none of whom—neither of whom I would submit was able to give a plausible explanation of their own red zone and yellow zone practices and their country risk classifications.

I think that array sustains a finding of an implied mutual understanding that the Philippine law is applicable. But worse, for our case it certainly does not prove the opposite, that there was an implied understanding that Philippine law did not apply.

So to summarize this point, while I submit that the Court could conclude from the evidence that there was an implied mutual understanding that Philippine law applied, at worse for my case I think you could find no more than an absence of such an understanding.

There simply is no basis for finding an agreement or understanding on the part of Citibank that Philippine law did not apply.

Let me turn for a moment to rate. The situation of rate to the issues in this case lies in the [39] differential between the rate in New York and the rate in Manila. That spread which is not in dispute primarily reflects the absence of reserve as attributable to the offshore deposits.

THE COURT: Also the insurance.

MR. HOFFMAN: And a number of other factors. I think to a man—and I don't know whether the one woman testified—but all the witnesses, I think, agreed that there were a number of elements that go into a rate structure. But when you are talking about a differential structure between an offshore rate and an on-shore rate, the primary differential is between the cost of fund aspects, FDIC insurance and reserves.

And the other things in most instances are imperceptable. You may recall I tried to use a hypothetical example, say, of a deposit with the Central African Republic, if anybody here took deposits and anybody there made deposits, and while you might expect to find a 30 or 40 percent rate, you would say, ah ha, there is at least 30 percent sovereign risk.

In a normal situation between the rate that is paid in New York and the rate that is paid overseas, because it is payable overseas, offshore Eurodollar deposits, even though they are cleared through New York, are exempt from reserves if they are only payable outside the United [40] States.

WAFL has expressly conceded and agreed that the deposits in this case are exempt from reserves. The deposits would not have been exempt and the 10 percent rate would not have been available if the deposits were payable in New York or guaranteed by the head office.

Thus the relevant rate comparison is between the rate for a deposit payable only outside of the United States and the lesser domestic rate for deposit payable in the United States. And that fact is relevant because it relates to the choice of law issue. The deposits are subject to Philippine law because they are payable in the Philippines.

WAFL tried to do something different with rates. It tried to prove the absence of sovereign risk and it set out to compare the rates paid by a number of local Philippine institutions of somewhat questionable credit quality with the rate paid by Citibank in Manila.

I would submit that that flawed and spurious comparison proved nothing other than that those institutions paid more than Citbank paid in the Philippines.

Our position on rates is that they support a finding of sovereign risk because they support the finding that these deposits were payable only outside the United States. That is the situation of the rate [41] differential. That at worst for our case, the rates certainly don't prove the contrary. They certainly don't prove that the deposits are payable in New York and subject to New York law. And they do nothing at all to establish WAFL's bizzare theory of fungible branch liabilities, which I am going to get to in a moment.

So, to summarize, I think the Court could find an implied agreement that Philippine law applies on the basis of evidence of the understanding of the parties, custom and usage and the New York and Manila rate differential. But there is clearly no difference for a finding that Philippine law does not apply.

Assuming the Court assumes that the evidence, as I have tried to review it, is insufficient to establish a mutual understanding, that there was no express agreement and no mutual understanding, what then? Then

you turn to the law. And there is an immense body of case law supported by the federal—relevant Federal Bank Registry structure and regulations demonstrating conclusively that these deposits were subject to Philippine law. This conclusion is drawn not just by general choice of law principle, but by 70 years of cases involving the question of what law governs foreign branch deposits.

I am not going to try and run through all of the cases that are cited at various places in our pretrial [42] brief, our summary judgment brief, our post trial brief, but the Vishipco brief, United States against First National City Bank—what we call the Omar case—that is the one that went up to the Supreme Court in 1965, Zimmerman against Sutherland, Dunn against Bank of Nova Scotia, the Fifth Circuit, Bluebird Undergarment, an old case in New York, but it is one that has been cited for decades by the New York courts; Tillman, Dougherty against National City Branch, Braka, Calleo, and the countless others support the conclusion that a bank branch deposit is payable at that branch.

That is consistent with laws of other countries. The other major international financial center, London, has a string of cases that reach the same result, starting with Clare Dresner, Arab Bank against Barclays, and most recently even the Libyan Arab Foreign Bank case.

Those cases are consistent with the public policies of the State of New York as revealed in Section 138 of the New York banking law, an argument that we made, I think, in our pretrial brief at some length, your Honor.

As I say, I don't think it is worth taking your Honor's time to cite more cases or quote from them. You indicated that you spent some time with them this weekend. I would be happy to emphasize the fact, however, that this is not a novel issue.

[43] THE COURT: I think on the issue of whether Philippine law applies, I don't have to accept any concessions which haven't been made. But it seems to me, for the purposes of this case, I ought to assume Philippine law applies.

MR. HOFFMAN: Let me turn then to the Philippine law, your Honor, and I think it might be helpful if just for ease of reference, I handed up a copy of MAAB 47, so that we have in front of us what we are talking bout. There is Defendant's Exhibit L.

I think it is quite important to keep in front of us what MAAB 47 says, and not what its lawyers—what WAFL's lawyers keep saying it says.

This regulation applies to all foreign currency obligations not those just covered by local assets.

From the beginning, WAFL has claimed that in some way this regulation was limited to a restriction on Citibank paying with local assets. That just isn't what it says, and Mr. Aquilla, our Philippine law expert, so stated in his affidavit which is Defendant's Exhibit DDD.

THE COURT: Equally, he is your lawyer.

MR. HOFFMAN: He is our lawyer, that's right, your Honor. That is what Mr. Aquilla says.

THE COURT: Where does he say—

MR. HOFFMAN: In paragraph 13, your Honor, [44] he says that: MAAB 47 creates a legal impossibility that prohibits Citibank Manila from repaying the deposits without prior Central Bank approval and excuses Citibank Manila's performance until the requisite approval is granted.

THE COURT: Hasn't Citibank got approval to pay with non-Philippine assets?

MR. HOFFMAN: Citibank asked for approval to pay with its non-Philippine assets.

THE COURT: It got them.

MR. HOFFMAN: Your Honor will recall the testimony from Mr. Buenaventura on the subject. He gave the amount of the non-Philippine assets that Citibank Manila had control over and he testified about the history of trying to get approval and there was an exchange of correspondence and they finally got approval and paid to the extent of those assets.

The point, your Honor, is this: The government of the Philippines is not concerned with whether Citibank Paris

pays WAFL. It has no concern whether Citibank Tokyo—

THE COURT: Does it have any concern whether Citibank Manila pays WAFL with Citibank New York's assets, assuming for the sake of argument there to?

MR. HOFFMAN: Assuming that Citibank Manila had control of those assets.

[45] THE COURT: No, Citibank Manila has got control of nothing. Citibank Manila does what Citibank New York tells it to do. It has no independent control. It has a teller who does what he is told. If the teller of Citibank Manila is told that Citibank New York has just transferred enough assets to pay the rest of these things and needs to go ahead and pay it, would that in any way violate this decree?

MR. HOFFMAN: I think the hypothesis that you give is that Citibank New York transfers additional assets to Citibank Manila—in other words, it tops it up above what they have now, their local assets.

THE COURT: Citibank—I suppose it is silly to talk of Citibank New York; there is no such operation. Citibank—an officer of Citibank located in New York sends a—

MR. HOFFMAN: I think we both understand here. It sends some money out there.

THE COURT: It sends precisely the amount of money left due the plaintiff and instructs the teller to pay that money to the plaintiff in Manila, would that in any way offend the decree?

MR. HOFFMAN: At that point, your Honor, Citibank Manila would still be obligated to obey MAAB 47.

THE COURT: Wouldn't that be obeying it if [46] they did that?

MR. HOFFMAN: Not at all, your Honor. They would do—and I would expect what they would do would be to go to the central bank and ask for permission to use those funds.

THE COURT: It is a given that they would get the permission. So if that is true—

MR. HOFFMAN: It may be a given, but personally I wouldn't be so sure. I would not expect that one can assume that the Philippine Government will always do what makes sense to you and me.

As long as there is a general prohibition, they have got to get permission to use those fresh funds to pay because the provisions of MAAB 47 is a blanket restriction. And I might—

THE COURT: That gives rise—I made a finding of fact that Citibank, Mr. Buenaventura had done everything to get permission, but I didn't take into account in making that finding this proposition they could have done just this, and then asked if that's okay, and I see nothing in the evidence to suggest that it wouldn't have been okay, all these ex parte communications would have confirmed them.

MR. HOFFMAN: Your Honor, the structure of these regulations is really similar to what we have seen [47] in similar situations in the United States.

THE COURT: I mean this document that I have in my hand, Defendant's Exhibit L, is it—

MR. HOFFMAN: That's right.

THE COURT: —I wasn't sure if it was L or 1, the way it is written—Defendant's Exhibit L obviously is a very hastily secured document and it was interpreted along the line, and certainly my impression of the interpretation is that, as plaintiff's expert said, it was intended to deal with Philippine assets and I see no other reason why they would give the permission they did give.

MR. HOFFMAN: That isn't what it says, your Honor.

THE COURT: I understand that is not what is says, but what it says is not that clear: "shall not reduce without central bank's approval."

THE COURT: That is clear.

MR. HOFFMAN: Your Honor, I won't pretend that this is the best drafted document and I think I said when we first started examining this thing, that this is

something that probably could be drafted more clearly, but it is what we have to work with and so long as it sits there with a blanket prohibition, that is effective with regard to this branch, they have got to obey it.

THE COURT: In the light of what was just [48] said, don't I have to modify my finding of fact that they have done everything possible to get the approval, because certainly they didn't do that, certainly they didn't do what you and I just postulated we could do? Have the officer sitting in New York transfer to the branch in Manila sufficient funds to pay these people and then ask the central bank for permission. That would have been very simple.

MR. HOFFMAN: Your Honor, I will concede that Citibank in New York did not transfer additional funds to Manila.

THE COURT: Wouldn't that be a necessity for making the defense of impossibility viable, that you have to do everything possible to make it possible to avoid the impossibility?

MR. HOFFMAN: I don't think so, your Honor. I think the concept of doing everything possible doesn't avoid the—

THE COURT: Why not? Possible, it is not only possible but it is so easy that you don't even have to think.

MR. HOFFMAN: The problem, your Honor, is this: There is a difference between what is possible—and we have said all along that it is possible for Citibank to pay this claim—

[49] THE COURT: In Manila.

MR. HOFFMAN: And pay it in a way that will not offend the Philippines.

THE COURT: Then why isn't that in your argument?

MR. HOFFMAN: Should it have an obligation?

THE COURT: Why shouldn't it have an obligation unless it offends the Philippine Government?

MR. HOFFMAN: Why should they go through that circuitous process? They could pay them directly.

THE COURT: I assume for the argument that this could have been paid in Manila and why couldn't it have been paid in Manila if all they had to do was transfer the fund?

MR. HOFFMAN: Take my hypothesis, your Honor. If Citibank could, which it can, send the money to Manila, why wouldn't it just pay them direct?

THE COURT: I don't know why they wouldn't pay them direct.

MR. HOFFMAN: The answer is that they aren't obligated.

THE COURT: Why aren't they obligated to do everything possible to pay them in Manila? I assume for the sake of argument that this is payable in Manila and if it was impossible to pay in Manila, they would have as [50] a defense it is impossible for Citibank to pay in Manila, not some branch of Citibank. Maybe that is what Bank America did, which neither of you wanted to find out.

Bank America paid all its deposits, everybody seemed to agree to that, although nobody said so, but everybody seemed to agree to it—I mean nobody who knew—everything agrees that Bank of America paid off its plaintiffs, shall we say?

MR. HOFFMAN: With assets that Bank of America of Manila had offshore.

THE COURT: That is what he said was said to him. But that is hearsay and obviously that is what his friend, he thought, wanted to hear, and that is what he said.

But it seems to me highly unlikely that Bank of America had without transfer enough offshore assets to pay off all these debts. I mean, that seems highly unlikely.

MR. HOFFMAN: Your Honor, I don't know if it is likely or unlikely. That is what we heard from him and I have no reason to question it.

THE COURT: I didn't have any reason to question him when I heard it, because Mr. Buenaventura was

such a credible witness that he kind of gives credibility to hearsay people that he is talking to.

[51] But I can't conceive of him of running an operation with so much money located in the Philippines they can pay off all their liabilities with non-Philippine assets and then still keep going. That seems like a silly idea.

But anyway, certainly, it would have been easy for you to do it and I can't quite see why you are not obligated to do it if it is not that easy.

MR. HOFFMAN: Your Honor, I would be perfectly happy to stipulate with counsel to reopen the trial record and subpoena the Bank of America.

THE COURT: You may stipulate with counsel, but you can't stipulate with me.

MR. HOFFMAN: I am not proposing it.

THE COURT: It means more delay and I am not accusing either of you of it—

MR. HOFFMAN: Our position on MAAB 47 is what we are stuck with and it is a general prohibition against paying foreign exchange obligations. It is like similar restrictions that are imposed by the United States when we do controls of this nature.

What they do is enact a sort of blanket prohibition and then enact special license. What we have seen happen here, this is the regulation, and like it or not we have it in front of us and we are obligated [52] to comply with it.

WAFL, trying to escape from those restrictions, and assuming from their argument that the restrictions did apply, has dreamed up a strange and fanciful deposit contract that never existed, and then claimed that MAAB 47, which it also distorts, didn't prevent that hypothetical agreement to its satisfaction.

Citibank never claimed that there was a contractual limitation for the liability for the Manila deposits for local assets and that would be obviously inconsistent with our position on credit responsibility. The futility of relying on this self-evident proposition is illustrated by a simple case not involving the debt moritorium.

Assume that a bank branch squanders its funds and becomes illiquid. Does that mean that its liabilities have gone down pro tanto? We have always maintained that the head office is responsible for credit support in such a case.

WAFL's asset-based argument is and always has been a red herring designed to draw the Court away from the settled body of the case law regarding the nature of a branch bank deposit.

So I just conclude by saying that the MAAB 47 blanket restriction prevents payment of the liabilities, [53] and it is an irrelevant and self-evident proposition that the Central Bank of the Philippines doesn't care whether Citibank's head office or other branches elsewhere in the world otherwise settle payment of French francs in Paris or deutsche marks in Germany or dollars in New York. It is concerned with what it does in the Philippines.

Finally, I would like to say just a word about WAFL's theory of fungible liabilities. This is a sort of notion of last resort that takes up most of WAFL's reply brief. It is the extreme illustration of plaintiff's approach that if Citibank isn't forbidden to do something it must do it.

I said at the start this is a contract case. It is about legal obligations. And WAFL's fungible liability theory pretends to create an obligation out of one concept that Citibank is a single corporate entity. But to assert that as a result of branch deposit is automatically a liability of and payable at every other branch defies a century of settled U.S. and foreign case law, and is totally incompatible with the system of federal bank regulation that Wells Fargo was subject to just as much as Citibank.

A Eurodollar deposit in London is not automatically payable in German marks in Frankfurt; Japanese [54] yen in Tokyo, Swiss francs in Zurich and dollars in New York at the option and whim of the depositor. You place that notion along the reality of Regulation D and one or

the other is annihilated just like antimatter coming in contract with matter.

It would also render absurd one of the provisions of the Federal Reserve regulations which is cited in the Clearing House brief and I would like to hand a copy of that up—this is from the Controller's Manual for National Banks, it is 12 of CFR Section 7.7012, which provides regulatory authority for a national bank to guarantee the deposits of its foreign branches.

There wouldn't be any purpose in having such a regulation if they were automatically guaranteed and if they were automatically guaranteed, there wouldn't be any sense at all in Regulation D.

Finally, turning back to the cases for a minute, I think the key cases to refer to are the pair of decisions in the Cuban cases involving the Chase Manhattan Bank. That is the Perez case coming out of the New York Court of Appeals, and the Garcia case which was decided in the Second Circuit.

Those cases both involve depositors with one of Chase Manhattan's branches in Havana. They both started out in the courts at about the same time and [55] wended their way up through the state court system and the federal court system almost in tandem. The decisions were kind of leapfrogging each other as they went up.

And your Honor will recall in one case the depositor won and in one case the depositor lost.

Both cases involved findings that in each case Chase had made a special agreement with its depositor to pay outside of Havana. Those arrangements were made apparently at the request of the depositors in those cases because of fear that something may happen. The deposits, as I recall, were made when Fidel Castro was beginning to come down out of the mountains and they were nervous. So they asked for special assurances from Chase that they would be able to get their money outside.

In the one case, the Perez case, the jury found that there was a special arrangement made and hence the de-

posit in that case had multiple situses. It didn't have a single situs in Havana because Chase had made a special agreement that it would pay outside. It also had a situs outside. But it was a single obligation.

In the Garcia case, however, the jury apparently went further. At least the Second Circuit thought the jury went further and found a fact that was different. And I am quoting now from the decision in Garcia, which is 735 F.2d 645 page 650, the Second Circuit said about [56] the facts:

"The purpose of the agreement between Chase and Dominicus and Garcia was to ensure that no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay the depositors upon presentation of their CD."

That wasn't present in Perez.

These two cases which at first blush seen irreconcilable, other than that one was a state case and one was a federal case, really illustrate the point that we have been trying to make all along, and that is that absent a special agreement by the bank to pay elsewhere, a guarantee that you will be paid elsewhere regardless of what happened in the country where the branch is located, the deposit obligation is subject to the law in that country.

I would submit that the Court should follow the settled issues of law and dismiss it.

Thank you, your Honor.

THE COURT: Do you want to say anything about those two cases just discussed?

(Recess)

[57] MR. SNIDER: Your Honor, I would like briefly to clarify three points and I would like to do it right from the table.

THE COURT: Fine.

MR. SNIDER: First of all, Mr. Hoffman referred to the deposition testimony of one Bryant Wagar who at one time was an employee and director of WAFL and read part of the passage from Mr. Wagar's deposition to

your Honor. I would like to point out as we have in our brief that Mr. Wagar was a former Citibank employee, that he testified that he developed this view when he was at Citibank, did not share it with others at WAFL and that others at WAFL did not share his view.

He had his own view, one he developed at Citibank so he really is like Mr. Wood, who testified he came over from Crocker and brought to Citibank this internal view other people did not know about.

Secondly, I would like to point out that with respect to the exhibit Mr. Hoffman handed up, 7.7012, apparently—the 12th U.S.C.—

MR. HOFFMAN: CFR, I think.

THE COURT: Where it says D miscellaneous?

MR. SNIDER: Correct. The provision he is referring to, which is halfway down the column on the left, 7.7012, which talks about guarantees, is [58] obviously talking about a Corporation and of course you can guarantee an obligation of a subsidiary or some other separate corporation. That is not what we are talking about here.

We are talking about a branch. So this is not applicable, your Honor.

THE COURT: What is this 77,000, at the top of that page? What does that mean?

MR. SNIDER: The national bank may lawfully endorse or otherwise guarantee notes sold by the bank for its own account. The amount of the obligations covered by such guarantees should be reflected by the liability reflected at the bank.

I have not studied that, your Honor. My third point, at the end of Mr. Hoffman's argument we heard about what Garcia and Perez did and from that argument Mr. Hoffman argued, therefore, that Philippine law should apply.

Your Honor, for both of our arguments we have assumed that Philippine law applies. Once that MAAB applies it does not prohibit repayment.

THE COURT: Mr. Hoffman?

MR. HOFFMAN: Just responding on the point of the provision from the code of federal regulations if you read all of it it does not seem that it does apply [59] to the foreign branches; corporate instrumentalities of foreign countries.

The situation of this is consistent with the situation of the fact that the fed in its Reg D interpretations does contrary to the suggestion of Mr. Snider during his argument, does attach significance to the question whether the head office has guaranteed a foreign depositor or not. The consequence is abundantly clear.

In one case it is reservable and in the other case it is not.

So I think that that in fact is a very significant fact in your Honor's considerations.

THE COURT: Thank you very much. I think I have absorbed as much information as I can and I will try to apply to it such wisdom as I have got.

MR. SNIDER: Thank you, your Honor.

MR. HOFFMAN: Thank you, your Honor.

THE COURT: Next time you make these arguments you can make them to a different court. Thank you very much.

STATUTORY PROVISIONS

12 U.S.C. 602 (1988)

§ 602. Reports and examinations

Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described in subsection second of section 601 of this title shall be required to furnish information concerning the condition of such banks or corporations to the Board of Governors of the Federal Reserve System upon demand, and the Board of Governors of the Federal Reserve System may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best.

(Dec. 23, 1913, ch. 6, § 25, 38 Stat. 273; Sept. 7, 1916, ch. 461, 39 Stat. 775; Sept. 17, 1919, ch. 60, § 3, 41 Stat. 286; Aug. 23, 1935, ch. 614, § 203(a), 49 Stat. 704.)

Codification

Section is part of section 25 of act Dec. 23, 1913, as amended, which comprises this subchapter.

Amendments

1919—Act Sept. 17, 1919, corrected reference to preceding section.

1916—Act Sept. 7, 1916, substituted "operating" for "which shall receive authority to establish foreign branches" and inserted "every member bank investing in the capital stock of banks or corporations described in subsection second of section 601 of this title".

Change of Name

Section 203(a) of act Aug. 23, 1935, changed the name of the Federal Reserve Board to Board of Governors of the Federal Reserve System.

Exceptions as to Transfer of Functions

Functions vested by any provision of law in the Comptroller of the Currency, referred to in this section, not included in the transfer of functions to the Secretary of the Treasury, see note set out under section 1 of this title.

12 U.S.C. § 604 (1988)

§ 604. Accounts of foreign branches; profit and loss

Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

(Dec. 23, 1913, ch. 6, § 25, 38 Stat. 273; Sept. 7, 1916, ch. 461, 39 Stat. 756.)

Codification

Section is part of section 25 of act Dec. 23, 1913, as amended, which comprises this subchapter.

The words "national banking association operating foreign branches" were in the original "such banking association".

Amendments

1916—Act Sept. 7, 1916, substituted "accrued" for "accruing".

§ 604a. Regulations authorizing exercise by foreign branches of usual powers of local banks; restrictions

Regulations issued by the Board of Governors of the Federal Reserve System under this subchapter, in addition to regulating powers which a foreign branch may exercise under other provisions of law, may authorize such a foreign branch, subject to such condition and requirements as such regulations may prescribe, to exercise such further powers as may be usual in connection with the transaction of the business of banking in the places where such foreign branch shall transact business. Such regulations shall not authorize a foreign branch to engage in the general business of producing, distributing, buying or selling goods, wares, or merchandise; nor, except to such limited extent as the Board may deem to be necessary with respect to securities issued by any "foreign state" as defined in section 632 of this title, shall such regulations authorize a foreign branch to engage or participate, directly or indirectly, in the business of underwriting, selling, or distributing securities.
(Dec. 23, 1913, ch. 6, § 25 (par.), as added Aug. 15, 1962, Pub. L. 87-588, 76 Stat. 388.)

REFERENCES IN TEXT

This subchapter, referred to in text, was in the original "this section", meaning section 25 of act Dec. 23, 1913, which classified to this subchapter (§ 601 set seq.).

CODIFICATION

Section is a part of section 25 of act Dec. 23, 1913, as amended, which comprises this subchapter.

§ 632. Jurisdiction of United States courts; disposition by banks of foreign owned property

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. Such removal shall not cause undue delay in the trial of such case and a case so removed shall have a place on the calendar of the United States court to which it is removed relative to that which it held on the State court from which it was removed.

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any Federal reserve bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any Federal reserve bank which is a defendant in any such suit may, at any time before the trial thereof, remove such suit from a State court in the district court of the United States for the proper district by following the procedure for the re-

moval of causes otherwise provided by law. No attachment or execution shall be issued against any Federal reserve bank or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court.

Whenever (1) any Federal Reserve bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to the Federal Reserve bank, the payment, transfer, delivery, or other disposal of such property by such Federal Reserve bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of the Federal Reserve bank for or with respect to such property.

Whenever (1) any insured bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control,

or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to such insured bank, the payment, tranfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property. Any suit or other legal proceeding against any insured bank or any officer, director, or employee thereof, arising out of the receipt, possession, or disposition of any such property shall be deemed to arise under the laws of the United States and the district courts of the United States shall have exclusive jurisdiction thereof, regardless of the amount involved; and any such bank or any officer, director, or employee thereof which is a defendant in any such suit may, at any time before trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of the Gold Reserve Act of 1934, as amended, the Silver Purchase Act of 1934, as amended, or subdivision (b) of section 5 of the act of October 6, 1917, as amended, or any actions, regulations, rules, orders, or proclamations taken, promulgated, made, or issued pursuant to any of such statutes. In any case in which a license to act with respect to any property referred to in this section is required under any of said statutes, regulations, rules, orders, or proclamations, notification to the Secretary of State by the proper Government officer or agency of the issuance of any appropriate license or that appropriate licenses will be issued on application shall be a prerequisite to any action by the Secretary of State pursuant to this

section, and the action of the Secretary of State shall relate only to such property as is included in such notification. Each such notification shall include the terms and conditions of such license or licenses and a description of the property to which they relate.

For the purposes of this section, (1) the term "property" includes gold, silver, currency, credits, deposits, securities, choses in action, and any other form of property, the proceeds thereof, and any right, title, or interest therein; (2) the term "foreign state" includes any foreign government or any department, district, province, county, possession, or other similar governmental organization or subdivision of a foreign government, and any agency or instrumentality of any such foreign government or of any such organization or subdivision; (3) the term "central bank" includes any foreign bank or banker authorized to perform any on or more of the functions of a central bank; (4) the term "person" includes any individual, or any corporation, partnership, association, or other similar organization; and (5) the term "insured bank" shall have the meaning given to it in section 12B of this Act.

(Dec. 23, 1913, ch. 6, § 25(b), as added June 16, 1933, ch. 89, § 15, 48 Stat. 184, and amended Apr. 7, 1941, ch. 43, § 2, 55 Stat. 131.)

References in Text

The Gold Reserve Act of 1934, as amended, referred to in text, is act Jan. 30, 1934, ch. 6, 48 Stat. 337, as amended, which enacted sections 315b, 405b, 408a, 408b, 440 to 446, 754a, 754b, 822a, 822b, and 824 of former Title 31, Money and Finance, and amended sections 314, 316, 733, 734, 752, 753, 767, 771, and 821 of former Title 31 and sections 411, 412, 413, 414, 415, 417, and 467 of this title. Title 31 was revised, codified, and enacted into law by Pub. L. 97-258, § 1, Sept. 13, 1982, 96 Stat. 877. For disposition of section of former Title 31 into revised

Title 31, see Table preceding section 101 of Title 31. For complete classification of this Act to the Code, see Tables.

The Silver Purchase Act of 1934, as amended, referred to in text, is act June 19, 1934, ch. 674, 48 Stat. 1178, which was classified to sections 311a, 316a, 316b, 405a, 448 to 448e, 734a, and 734b of former Title 31, Money and Finance, and was repealed by Pub. L. 88-36, title I, § 1, June 4, 1963, 77 Stat. 54. For complete classification of this Act to the Code, see Tables.

Subdivision (b) of section 5 of the act of October 6, 1917, referred to in text, is classified to section 95a of this title and section 5(b) of the Appendix to Title 50, War and National Defense.

Section 12B of this Act, referred to in the text, was section 12B of the Federal Reserve Act and was formerly classified to section 264 of this title. Section 12B was withdrawn from the Federal Reserve Act and made a separate act to be known as the Federal Deposit Insurance Act by section 1 of act Sept. 21, 1950, ch. 967, 64 Stat. 873. The Federal Deposit Insurance Act is classified generally to chapter 16 (§ 1811 et seq.) of this title.

Codification

Section was enacted as a new section 25(b) of the Federal Reserve Act, and not as part of section 25(a) of that Act which comprises this subchapter.

Amendments

1941—Act Apr. 7, 1941, added last four pars.

Federal Rules of Civil Procedure

Execution, see rule 69, Title 28, Appendix, Judiciary and Judicial Procedure.

One form of action, see rule 2, Title 28, Appendix.

Cross References

Jurisdiction of federal questions dependent upon amount in controversy, see section 1331 of Title 28, Judiciary and Judicial Procedure.

Procedure for removal of cases, see section 1446 of Title 28.

Section Referred to in Other Sections

This section is referred to in sections 358, 604a of this title.

FED. BANKING L. REP. (CCH) ¶ 30,4990
at 14358

STAFF OPINION OF FEBRUARY 23, 1982

Deposits Payable Outside United States—Funds Deposited by U.S. Parent's Trust Department

The trust department of a bank places trust cash in a non-interest-bearing time deposit at the bank's Nassau branch. Funds placed in the Nassau branch are not subject to reserve requirements and create a greater credit for the trust department than funds deposited with the bank's U.S. offices, which are subject to reserves. There is no written agreement between the Nassau branch and the trust department for this arrangement, and funds deposited have a one-day maturity.

The practice described does not violate Regulation D, which generally does not limit the ability of a foreign branch of a depository institution to accept deposits of $100,000 or more from U.S. residents, including cash balances of the bank's own trust department accounts. However, if the deposits at foreign branches are not payable only outside the United States, then such deposits would be subject to Regulation D reserve requirements. STAFF OP. of Feb. 23, 1982.

Authority: 12 CFR 204.2(t)

STAFF OPINION OF MARCH 21, 1983

Deposits Payable Outside the United States—CD Issued in the United States

A bank proposed to issue, in New York City, certificates of deposits that would be payable at a branch of the bank outside of the United States. No provision in Regulation D or Q requires that a certificate of deposit be physically issued outside of the United States in order to qualify for the exemption from the reserve requirements is that the deposit by payable only at an office out-

side the United States, as defined in section 204.2(t). STAFF OP. of March 21, 1983.

Authority: 12 CFR 204.1(c)(5) and 204.2(t).

STAFF OPINION OF JULY 29, 1983

Deposits Payable Outside United States—Guarantee by U.S. Bank

Reserve requirements do not apply to an obligation that is payable only at an office located outside the United States. This exemption is intended principally to enable foreign branches of U.S. banks to compete on a more equal basis with other banks in foreign countries in accordance with the laws and regulations of those countries. A customer who makes a deposit that is payable solely at a foreign office assumes the risk that the foreign country might impose restrictions on withdrawals. A U.S. bank inquires whether a certificate of deposit issued by a foreign subsidiary but guaranteed by the U.S. bank to be payable in the United States is a reservable obligation of the U.S. bank even though the U.S. bank does not receive any funds for use in its banking business.

When payment of a deposit in a foreign office is guaranteed by a promise of payment at an office in the United States in the event the deposit is not paid at the foreign office, the depositor does not assume the same risk assumed by local depositors but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the bank. The fact that the proceeds are not used by the guarantor is irrelevant to the issue of the reservability of deposits guaranteed by the U.S. office. To ensure the effectiveness of, and to prevent evasion of, Regulation D, such guaranteed foreign deposit must be subject to the reserve requirements of the guarantor U.S. bank. STAFF OP. of July 29, 1983.

Authority: 12 CFR 204.1(c)(5).

4 Federal Reserve Bulletin 1123-24 (1918)

November 1, 1918.

LAW DEPARTMENT.

The following opinions of counsel have been authorized for publication by the Board since the last edition of the BULLETIN:

Reserves of foreign branches.

Section 19 of the Federal Reserve Act, which prescribes reserves to be carried by member banks, does not apply to foreign branches of national banks; but, under the special power vested in the Federal Reserve Board by section 25 to prescribe conditions and regulations under which foreign branches may be established, it is authorized to prescribe the amount, character, and location of reserve to be maintained against deposits received in such branches.

OCTOBER 7, 1918.

SIR: Section 25 of the Federal Reserve Act, as amended by the act approved September 7, 1916, provides in part as follows:

"Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said Board, either or both of the following powers: First, to establish branches in foreign countries, or dependencies or insular possessions of the United States, for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agent of the United States, * * *.

One of the national banks which has established branches in certain foreign countries under authority of this section has asked the Federal Reserve Board what

reserve must be carried against deposits received in foreign branches and where such reserve must be carried.

You have requested the opinion of this office on the question submitted.

The bank in question is located in New York, which is a central reserve city. Section 19 of the act as amended, which prescribes reserve to be carried by member banks, provides in part that—

"Every bank, banking association, or trust company, which is, or which becomes, a member of any Federal Reserve Bank, shall establish and maintain reserve balances with its Federal Reserve Bank as follows: * * * (c) If, in a central reserve city as now or hereafter defined, it shall hold and maintain with the Federal Reserve Bank of its district an actual net balance equal to not less than 13 per cent of the aggregate amount of its demand deposits and 3 per cent of its time deposits."

The first question to be determined is whether this requirement applies to deposits received in foreign branches of a member bank. It is true that there is no separate corporate entity as between the parent bank and its branch. A deposit liability of a branch is, therefore, a liability of the parent bank, and if section 19 is interpreted literally the language is no doubt broad enough to cover deposits received in foreign countries through branches.

Section 25, however, provides that these branches may be established "upon such conditions and under such regulations as may be prescribed by the said Board" (i.e., the Federal Reserve Board).

It is obvious, therefore, that Congress recognized the fact that no rigid rule could be enforced governing the operations of foreign branches if these branches are to accomplish the purpose for which they are created, viz, to further the foreign commerce of the United States.

Such branches are necessarily subject in their local operations to the laws of various sovereignties, and it was, therefore, necessary to vest in the Federal Reserve Board some discretion as to the restrictions to be imposed upon the operations of foreign branches in order that the interests of the parent bank might be safeguarded and the creditors in this country might be protected.

The reserve requirements of section 19 were clearly intended to protect primarily the domestic creditors of member banks.

By an amendment to this section, member banks were permitted to transfer their entire reserve to the Federal Reserve Bank. The Federal Reserve Banks directly, or through their branches, are enabled to supply the currency needs of member banks with little delay, and reserve carried with a Federal Reserve Bank may, therefore, perform one of its principal functions, viz, to meet the abnormal withdrawals of domestic depositors. It is manifest, however, that reserve carried with a Federal Reserve Bank can not adequately perform this function in so far as foreign creditors of a national bank are concerned. It must be assumed, therefore, that Congress did not intended to provide that reserve should be carried against foreign deposits in a place where such reserve could not perform the functions it is intended to perform.

That Congress recognized the fact that laws governing the local operations of national banks could not consistently be strictly applied to the operations of foreign branches is further indicated by that part of section 25 which provides that—

"Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand."

If Congress had intended the operations of foreign branches to be subject to all provisions of existing laws

which affect the local operations of national banks, it would have been unnecessary to incorporate this provision in the act, since laws in force at the time of the passage of this act and its amendments contain adequate provision for requiring national banks to furnish full information to the Comptroller of the Currency as to the condition of such banks.

It is the opinion of this office, therefore, that under the special power vested in the Board to prescribe conditions and regulations under which foreign branches may be established, it is authorized to prescribe the amount, character, and location of reserve to be maintained against deposits received in such branches.

Respectfully,

M. C. ELLIOTT
Counsel

TO HON. W. P. G. HARDING,

Governor, Federal Reserve Board.

56 Federal Reserve Bulletin 140 (1970)

INTERPRETATION OF REGULATIONS D AND Q

DEPOSITS IN FOREIGN BRANCHES GUARANTEED BY DOMESTIC OFFICE OF MEMBER BANK

In accepting deposits at branches abroad, some member banks are reported to have entered into agreements from time to time with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment. The question has arisen whether such deposits are subject to Parts 204 and 217 (Regulations D and Q), and this interpretation is intended as a clarification.

Section 19 of the Federal Reserve Act provides that the limitations prescribed therein on rates of interest paid on deposits are not applicable to deposits of a member bank "payable only at an office thereof located outside of the States of the United States and the District of Columbia" (12 U.S.C. 371a). The Board ruled in 1918 that the requirements of section 19 as to reserves to be carried by member banks also do not apply to foreign branches (1918 Federal Reserve BULLETIN 1123).

In the Board's judgment, the applicability of these exemptions from Regulation Q and Regulation D is limited to deposits in foreign branches as to which the depositor is entitled, under his agreement with the bank, to demand payment only outside the United States, regardless of special circumstances. Said exemptions are intended principally to enable foreign branches of U.S. banks to compete on a more nearly equal basis with other banks in foreign countries in accordance with the laws and regulations of those countries. A customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country might

impose restrictions on withdrawals. When payment of a deposit in a foreign branch is guaranteed by a promise of payment at a banking office in the United States if not paid at the foreign office, the depositor no longer assumes such risk, but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the bank. To assure the effectiveness of Regulations D and Q and to prevent evasions thereof, the Board considers that such guaranteed foreign-branch deposits must be subject to those regulations.

Accordingly, a deposit in a foreign branch of a member bank that is guaranteed by a domestic office is subject to the interest rate limitations and reserve percentages of Regulations Q and D the same as if the deposit had been made in the domestic office.

This interpretation is not designed in any respect to prevent the head office of a U.S. bank from repaying borrowings from, making advances to, or supplying capital funds to its foreign branches.

LETTER FROM R. B. BUENAVENTURA TO THE PHILIPPINE CENTRAL BANK, DATED FEBRUARY 20, 1984

February 20, 1984
Governor Jose Fernandez
Central Bank of the Philippines

Dear Governor Fernandez:

As a result of the moratorium declared on October 14, 1983 and the subsequent actions of the Central Bank, Citibank Manila had been prevented from repaying U.S. Dollar deposits placed with it by foreign banks prior to that date.

We are anxious to try to resolve this situation and we propose that the Central Bank approve our repayment pro rata of deposits from foreign lenders (excluding Citibank) to the extent of Citibank Manila's offshore placements. This would entail the repayment from Citibank Manila's offshore placements of $298 million, which level we are currently maintaining in accordance with the moratorium, of our total borrowings of $638 million as of October 14, 1983. We have had continuing dialogue with the Chairman of the Advisory Committee and this action would have no impact on the base for new borrowings. We would undertake to have agreement in principle with the Advisory Committee through its Chairman to insure that snags and misunderstandings are not encountered as a result of this "unfreezing". We would appreciate receiving your authorization, to Citibank Manila to make these payments from its offshore placements.

We would also appreciate your advising us as soon as you are in a position to approve remittance of foreign exchange from the Philippines for repayment of prin-

cipal on the balance of Citibank Manila's deposits from foreign banks as of October 14, 1983.

Very truly yours,

/s/ [Illegible]

LETTER FROM THE PHILIPPINE CENTRAL BANK TO R. B. BUENAVENTURA, DATED MARCH 23, 1984

CENTRAL BANK OF THE PHILIPPINES

MANILA

Office of the Governor

March 23, 1984

Citibank, N.A.
8741 Paseo de Roxas
Makati, Metro Manila

Attention: Mr. Rafael B. Buenaventura
Senior Vice President

Gentlemen:

This refers to your letter requesting the Central Bank to approve the repayment pro rata of U.S. Dollar deposits placed with Citibank-Manila by foreign banks (excluding Citibank) to the extent of Citibank-Manila's offshore placements.

It is represented in your letter that the proposed action would have no impact on the base for new borrowings. It also stated that you would undertake to have agreement in principle with the Advisory Committee through its Chairman to insure that snags and misunderstandings are not encountered as a result of the repayment of said deposits.

Please be advised that we do not have any objection to the repayment pro rata of U.S. Dollar deposits placed with Citibank-Manila by foreign banks (excluding Citibank) to the extent of Citibank-Manila's offshore placements, provided we shall receive a written commitment that:

1. The level of outstanding foreign obligations of the Philippines for the purpose of the new money base shall not be reduced as a result of the repayments;

2. No undue preference in favor of any of your creditors results from the repayments; and

3. The share in the new money to be extended to the Philippines corresponding to the deposits paid shall not be funded from Philippine sources.

Very truly yours,

/s/ JOSE B. FERNANDEZ, JR.
Governor

LETTER FROM P. J. MULHERN, GENERAL COUNSEL OF CITIBANK, TO B. WAGER OF WELLS FARGO, DATED JANUARY 13, 1984

Patrick J. Mulhern
Senior Vice President
and General Counsel

January 13, 1984

Mr. Brian Wager
Senior Vice President
Wells Fargo Bank, N.A.
420 Montgomery Street
San Francisco, CA 94104

Dear Mr. Wager:

I am responding to your telephone inquiry to Shaukat Aziz, relating to deposits placed by your Bank with Citibank's Manila branch.

Our position on the commitments of Citibank's overseas branches is quite clear, and has been reiterated for many years, both in response to inquiries (from bank regulators, customers, etc.) and otherwise.

Citibank is a single corporate entity which conducts its commercial banking business at a number of Citibank locations throughout the world. Our Citibank Head Office, our domestic bank branches and our overseas bank branches are all integral parts of a single institution. Thus, an engagement by any of the bank branches is an engagement by Citibank.

Each overseas Citibank branch is, of course, required to comply with the laws of the country where it is situated and therefore its engagements—and, to that extent,

also the institution's—are affected by the impact of those laws.

In summary, it may be said that it is—and since the opening of Citibank's first overseas branch has been—Citibank's position that, as an institution, it is responsible for any breach of agreement by any overseas branch but, if the failure to perform is due to such branch's compliance with the law to which it is subject, then the failure does not constitute a breach for which either the branch or the institution as a whole is responsible.

We believe that this position reflects both the long-established practices and realities of the international marketplace and applicable law.

Sincerely,

/s/ Patrick J. Mulhern
PATRICK J. MULHERN
Senior Vice President &
General Counsel

TELEX FROM THE PHILIPPINE CENTRAL BANK TO WELLS FARGO LATIN AMERICAN BANK, CAYMAN ISLANDS, DATED DECEMBER 14, 1984

BPH UW

4410 WELLSCI CP

REF: 0159 CY

DECEMBER 28, 1984

TO: BROBECK, PHLEGER & HARRISON
SAN FRANCISCO

ATTN: DUNCAN HAYNES

PURSUANT TO OUR CONVERSATION OF TODAY, BELOW IS THE TELEX DISCUSSED:

QUOTE

DECEMBER 14, 1984

TO: WELLS FARGO LATIN AMERICAN BANK
CAYMAN ISLANDS

CC: DUNCAN HAYNES, ESQ.
BROBECK, PHLEGER AND HARRISON

FROM: JOSE B. FERNANDEZ, JR.
GOVERNOR, CENTRAL BANK OF THE PHILIPPINES

RE: OFF-SHORE RECOVERY OF FCDU DEPOSITS

WE REFER TO THE RECENT DISCUSSIONS BETWEEN SPECIAL NEW YORK COUNSEL MESSERS. CLEARY, GOTTLIEB, STEEN AND

HAMILTON, AND OUTSIDE COUNSEL FOR WELLS FARGO BANK REGARDING OFF-SHORE RECOVERY OF FCDU DEPOSITS. THIS COMMUNICATION WILL INFORM YOU THAT IF THERE IS A JUDGMENT BY A COURT OR AN EXTRAJUDICIAL SETTLEMENT TO THE EFFECT THAT A FOREIGN CURENCY DEPOSIT PLACED WITH A FOREIGN CURRENCY DEPOSIT UNIT ('FCDU') OF THE PHILIPPINE BRANCH OF A FOREIGN BANK IS RECOVERABLE FROM A NON PHILIPPINE OFFICE OF SUCH FOREIGN BANK AND IF SUCH LIABILITY IS SATISFIED FROM ASSETS HELD OUTSIDE THE PHILIPPINES AND DOES NOT RESULT, DIRECTLY OR INDIRECTLY, IN A NET OUTFLOW OF FOREIGN CURRENCY FROM THE PHILIPPINES THE CENTRAL BANK OF THE PHILIPPINES IS OF THE VIEW THAT THE SATISFACTION OR PAYMENT OF SUCH DEPOSIT LIABILITY ON THESE TERMS WOULD NOT BE INCONSISTENT WITH THE RESTRUCTURING PRINCIPLES SET OUT IN THE NOVEMBER 2, 1984 COMMUNICATION ADDRESSED TO THE INTERNATIONAL BANKING COMMUNITY.

REGARDS,

JOSE B. FERNANDEZ, JR.
GOVERNOR
CENTRAL BANK OF THE PHILIPPINES
MANILA

UNQUOTE

IF YOU HAVE ANY QUESTIONS, PLEASE DO NOT HESITATE TO CONTACT ME.

REGARDS

BILL SEE
WELLS FARGO INTERNATIONAL LIMITED
GRAND CAYMAN

4410 WELLSCI CP
BPH UW

VIA WUI Q
THEY DISC.
Elapsed time 00:85:02

PRINTED AT 1147 PDT 12/27/84

AFFIDAVIT OF G. R. CASTILLO OF PHILIPPINE LAW, DATED DECEMBER 12, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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84 Civ. 0996 (WK)

WELLS FARGO ASIA LIMITED,
Plaintiff,

-against-

CITIBANK, N.A.,
Defendant.

NOTICE PURSUANT TO RULE 44.1

TAKE NOTICE, that pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, the plaintiff intends to offer evidence at trial regarding Philippine law in the form of the attached affidavit of Gregorio R. Castillo dated December 12, 1986 and the exhibits attached thereto and

TAKE FURTHER NOTICE, that the foregoing evidence will be offered to controvert the evidence regarding Philippine law contained in the affidavit of Antonio V. Agcaoili dated November 28, 1986 annexed to defendant's Notice Pursuant to Rule 44.1 dated December 5, 1986.

Dated: New York, New York
December 12, 1986

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ [Illegible]
A Member of the Firm
Attorneys for Plaintiff
919 Third Avenue
New York, New York 10022
(212) 735-3000

To: SHEARMAN & STERLING
Attorneys for Defendant
153 East 53rd Street
New York, New York 10022
(212) 483-1000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 996 (WK)

WELLS FARGO ASIA LIMITED,
Plaintiff,

v.

CITIBANK, N.A.,
Defendant.

AFFIDAVIT OF GREGORIO R. CASTILLO

Gregorio R. Castillo, being duly sworn, states:

1. I am a practicing attorney in the Philippines, where I was admitted to the practice of law in 1958. I was graduated with a degree of Bachelor of Laws, cum laude and class valedictorian, from the University of the Philippines, College of Law in 1957. In 1959, I obtained a Master of Laws degree from Yale University. I am the managing partner of the law firm of Castillo, Laman, Tan & Pantaleon. My firm specializes in corporation, banking, finance and commercial laws and is counsel in the Philippines for a number of local banks as well as several non-Philippine banks doing business in the Philippines, including Wells Fargo Bank, National Association ("Wells Fargo").

2. I am at present a member of the American Society of International Law, The International Bar Association, and a number of professional and business organizations. I have served as special lecturer in corporate law and finance at University of the Philippines Law Center Seminars. My areas of expertise are Corporate Law, Bank and Finance Law and Transnational

Transactions. A substantial portion of my professional time is devoted to counselling clients concerning banking and finance law and the regulations formulated by the Central Bank of the Philippines to govern foreign currency transactions and the conduct of business by local banks and the branches of foreign banks in the Philippines. I also have extensive experience in the preparation of foreign currency contracts and agreements within the context of these regulations and in the problems involving foreign exchange remittances arising under those regulations.

3. I am familiar with the deposits at issue in this litigation (the "Deposits") and have reviewed the confirmations exchanged by the parties. I and other attorneys in my firm working under my supervision have thoroughly researched the issues relating to the liability of Citibank, N.A. ("Citibank") under Philippine law for the unpaid principal amount of Deposits.

MAAB 47

1. On or about October 17, 1983 the Central Bank issued Memorandum to Authorized Agent Banks No. 47 ("MAAB 47"). A copy of MAAB 47 is attached as Exhibit A hereto. MAAB 47 states in part:

> "Any remittance of foreign exchange for repayment of principal on foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank for prior approval."

2. In the case of a deposit booked at the Manila office of a non-Philippine bank such as Citibank, MAAB 47 does not apply to repayment of the deposit with non-Philippine assets. "Non-Philippine assets" are assets that are carried on the books of the bank's non-Philippine offices.

3. Accordingly, under Philippine law, Citibank may repay the Deposits at issue in this case without prior

Central Bank approval, as long as it uses non-Philippine assets for that purpose. (Such repayment may be made through Citibank's branch in Manila or anywhere else in the world).

Obligations to Use Non-Philippine Assets

4. Under Philippine law, branches of banks are not separate legal entities apart from the bank as an institution. As stated by the Philippine Supreme Court in *National City Bank of New York* v. *Posadas*, 60 Phil 630 [1934], (affirmed by the United States Supreme Court in Posadas vs. National City Bank of New York, 296 U.S. 497, 80 L. Ed. 351, 56 Sup. Ct. Rep. 349 (1936)):

> "The local branches of the National City Bank of New York have no separate corporate franchise, no separate capital stock, and are controlled directly through officers and managers appointed by the National City Bank of New York. . . .
>
> * * * *
>
> A branch is simply an extension of a national bank to foreign countries, (and) the branch of the National City Bank of New York in Manila is the National City Bank of New York doing business in Manila."

Accordingly, under Philippine law, obligations incurred at a branch are obligations of the bank as a whole. Citibank, the institution, is the legal entity that entered into the Deposit contracts at issue in this case, not its Manila branch.

5. Under Article 1933 (See Exhibit B) in relation to Article 1980 (See Exhibit C) of the Civil Code of the Philippines (the "Civil Code"), the obligation of a bank under a deposit contract is not to return the very same funds deposited, but rather to repay funds of the same kind and amount. The funds to repay a deposit need not

be funds booked at the same branch that booked the deposit. Rather, under Philippine law a depositor may look to any of the bank's assets, wherever located for repayment of a deposit.

6. In short, under Philippine law, Citibank's obligation to repay the Deposits is *not* limited to the assets booked at its Manila branch ("local assets").

Requests For Prior Central Bank Approval

7. MAAB 47 does not prohibit payment of deposits per se even if local assets are to be used for that purpose. Rather, MAAB 47 merely requires prior Central Bank approval before repayment can be made with such assets.

8. We are not aware of any written guidelines established by the Central Bank that govern applications for prior approval under MAAB 47. However, on several occasions in the past the Central Bank issued regulations that required approval for designated actions but did not issue written guidelines governing applications. In such cases, the established practice is that applications are made in the form of a letter to an officer of the Central Bank.

9. Article 1159 of the Civil Code (See Exhibit D) provides that "obligations arising from contracts have the force of law between the parties and shall be complied with in good faith." Parties "are bound not only to the fulfillment of what has been expressly stipulated but also to the consequences which, according to their nature, may be in keeping with good faith, usage, and law" (Article 1315, Civil Code). (See Exhibit E) Under Philippine law, a party claiming legal impossibility as a defense to a breach of contract action has the burden of proving that that which allegedly renders its performance impossible is "without the fault of the obligor" (Article 1266, Civil Code, see Exhibit F).

10. Under the foregoing principles, it is clear that a party asserting legal impossibility as a defense to a

breach of contract action based on a regulation requiring prior approval of a government entity must prove that an application for such approval was made. It is not enough for the party relying on such a legal restraint to assert that such applications were discouraged or likely to be denied; rather it must show that application was made and that such application was denied.

11. Accordingly, assuming *arguendo* that Citibank's obligation to repay the Deposits was limited to the assets of its Manila branch, unless Citibank can show that it complied with the terms of MAAB 47 and sought Central Bank approval to repay the Deposits with such assets, it cannot establish a defense of impossibility. Its inability to repay would be attributable neither to MAAB 47 nor the Central Bank, but to its own failure to apply for the appropriate clearance.

Custom

12. Under Philippine law, in order to imply a term into a contract based on custom, that custom must be fixed and invariable. A term will not be inferred from a few isolated instances or even frequent practices, but only from actual, fixed, invariable practice.

13. Moreover, a term will not be implied into a contract based on custom or usage if that term is not "in keeping with . . . law" (Civil Code, Article 1315, Exhibit E). An alleged term that limits a depositor to the assets of a particular branch is clearly not in keeping with Philippine law (See paragraphs 4 to 6 above). Under Philippine law, such a term will not be implied into the Deposit contracts based on an alleged custom.

Place of Payment

14. Philippine contract law is premised on the autonomy of will. As provided in Article 1159 (Exhibit D) of the Civil Code, "contracting parties may establish such stipulations as they deem convenient . . ." The express

terms of the Deposit contracts, as can be seen from the parties' confirmations, provided that repayment of the Deposits was to be made in New York. Under Philippine law, this stipulation as to place of payment has the force of law.

Legal Impossibility

15. MAAB 47 poses no legal impossibility that excuses Citibank from its obligation to repay the Deposits. Since MAAB 47 does not apply to repayment of the Deposits with non-Philippine assets, it is not "impossible" for Citibank to repay the Deposits without prior Central Bank approval.

16. Even if, *arguendo*, it is assumed that the Deposits are payable in Manila and that the Central Bank would deny a request by Citibank for prior approval to repay the Deposits in Manila with non-Philippine assets, under Philippine law Citibank is obligated to repay the Deposits elsewhere. Legal impossibility will excuse non performance of a contract only where the legal impossibility attaches to the "prestation" of a contract (Article 1266, Civil Code, Exhibit F). "Prestation" refers to the cause of a contract (Article 1350, Civil Code, see Exhibit G). Prestation, consent and subject matter comprise the essential elements of a contract (Article 1318, Civil Code, see Exhibit H). The place of performance is not part of the prestation of the Deposit contracts at issue in this case (Article 1933, Civil Code, Exhibit B). Assuming that Manila was the specified place of performance, impossibility of paying in Manila does not render Citibank's prestation to pay impossible so long as the payment can be performed somewhere else.

Conclusion

17. MAAB 47 does not prohibit repayment of the Deposits by Citibank [in Manila or anywhere else] as long as Citibank uses non-Philippine assets for this purpose.

Accordingly, it is not "impossible" for Citibank to repay the Deposits. Moreover, under Philippine banking law, an obligation incurred by Citibank at its Manila branch is an obligation of Citibank, N.A., and Citibank's obligation to repay the Deposits is not limited to its local assets.

18. Even if, *arguendo*, Citibank's obligation were limited to its local assets, Citibank may not rely on MAAB 47 as an excuse for its non-performance unless it can show it sought Central Bank approval to repay with such funds. As a matter of established practice, in the absence of formal application guidelines, such an application must be in the form of a letter application. As a matter of Philippine law, it is not sufficient for Citibank to assert that such applications were discouraged and would not have been granted; it must show that it actually complied with the requirements of the decree and sought Central Bank approval to repay.

19. Under Philippine law, a term may not be implied into the Deposit contracts based on an alleged custom which would lead to a result contrary to the foregoing conclusions.

/s/ Gregorio R. Castillo
GREGORIO R. CASTILLO
Affiant

SUBSCRIBED AND SWORN to before me this 12th day of December 1986, affiant exhibited to me his Residence Certificate No. 5808862 issued at Makati, Metro Manila on January 25, 1986.

/s/ [Illegible]
Notary Public
Until December 31, 1986
??? No. 8745128
Issued 1/27/86 at ————

CENTRAL BANK OF THE PHILIPPINES
MANILA

Office of the Senior Deputy Governor

MEMORANDUM TO AUTHORIZED
AGENT BANKS

Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours in New York City on October 14, 1983, shall not be reduced without prior Central Bank approval.

These measures shall apply to payments value dated during the period October 17, 1983 to January 16, 1984.

Appropriate sanctions shall be imposed on banks which fail to strictly comply with this directive.

FOR THE MONETARY BOARD:

/s/ Gabriel C. Singson
GABRIEL C. SINGSON
Senior Deputy Governor

MAAB No. 47

October 15, 1983

EXHIBIT 1 TO AFFIDAVIT OF G. R. CASTILLO: ARTICLE 1933 OF THE CIVIL CODE OF THE PHILIPPINES

ART. 1933. By the contract of loan, one of the parties delivers to another, either something not consumable so that the latter may use the same for a certain time and return it, in which case the contract is called a commodatum; or money or other consumable thing, upon the condition that the same amount of the same kind and quality shall be paid, in which case the contract is simply called a loan or mutuum.

Commodatum is essentially gratuitous.

Simple loan may be gratuitous or with a stipulation to pay interest.

In commodatum the bailor retains the ownership of the thing loaned, while in simple loan, ownership passes to the borrower. (1749a)

EXHIBIT 2 TO AFFIDAVIT OF G. R. CASTILLO: ARTICLE 1980 OF THE CIVIL CODE OF THE PHILIPPINES

ART. 1980. Fixed, savings, and current deposits of money in banks and similar institutions shall be governed by the provisions concerning simple loan. (n)

EXHIBIT 3 TO AFFIDAVIT OF G. R. CASTILLO: ARTICLE 1159 OF THE CIVIL CODE OF THE PHILIPPINES

ART. 1159. Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith. (1091a)

EXHIBIT 4 TO AFFIDAVIT OF G. R. CASTILLO: ARTICLE 1315 OF THE CIVIL CODE OF THE PHILIPPINES

ART. 1315. Contracts are perfected by mere consent, and from that moment the parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which according to their nature, may be in keeping with good faith, usage and law. (1253)

EXHIBIT 5 TO AFFIDAVIT OF G. R. CASTILLO: ARTICLE 1266 OF THE CIVIL CODE OF THE PHILIPPINES

ART. 1266. The debtor in obligations to do shall also be released when the prestation becomes legally or physically impossible without the fault of the obligator. (1184a)

EXHIBIT 6 TO AFFIDAVIT OF G. R. CASTILLO: ARTICLES 1953 AND 1980 OF THE CIVIL CODE OF THE PHILIPPINES

ART. 1953. A person who receives a loan of money or any other fungible thing acquires the ownership thereof, and is bound to pay to the creditor an equal amount of the same kind and quality. (1753a)

ART. 1980. Fixed, savings, and current deposits of money in banks and similar institutions shall be governed by the provisions concerning simple loan. (n)

EXHIBIT 7 TO AFFIDAVIT OF G. R. CASTILLO: ARTICLE 1318 OF THE CIVIL CODE OF THE PHILIPPINES

ART. 1318. There is no contract unless the following requisites concur:

(1) Consent of the contracting parties;

(2) Object certain which is the subject matter of the contract;

(3) Cause of the obligation which is established. (1261)

TELEX FROM CITIBANK TO WELLS FARGO ASIA SINGAPORE, LTD., DATED FEBRUARY 3, 1984

TO : WELLS ASIA SINGAPORE LTD.

ATTN : CLAY COLE, MANAGING DIRECTOR

FROM : CITIBANK MANILA

RE : YOUR PLACEMENT WITH CITIBANK MANILA FOR US $1 MM DUE 12/9/83 AND US $1 MM DUE 12/12/83

We would like to follow up our request to renew the above matured borrowing(s) for another three months. We reiterate our willingness to repay you but that at the present time we cannot pay without violating the 90 day standstill agreement which has been extended to April 16, 1984. Further, we are willing to pay a 1⅛% premium over the prevailing three month LIBO to reflect the Philippine sovereign risk you are taking.

We look forward to your positive response to our request.

A. M. V. JALANDONI / V. N. NARAGAS
VP-Treasury / VP-F I D

TELEX FROM CITIBANK TO MARINE MIDLAND BANK NEW YORK, DATED MARCH 26, 1984

*0
14732 TGROUP PS
*VIA PTT/CWI 17911
*03/26 2339
*PTS
0230427205+
*42205A MMBFMDo
14732 TGROUP PS11

TO : MARINE-MIDLAND BANK NY

ATTN : GAILLARD L. SCHMIDT, SR. VICE PRESIDENT

FROM : CITIBANK MANILA 3/26/84

RE : YOUR US DOLLAR 15 MILLION PLACEMENT WITH CITIBANK MANILA
DUE ON 3/27

WITH REFERENCE TO OUR TELEXES DATED 1/31/84 AND 3/23/84, WE WISH TO REITERATE OUR WILLINGNESS TO REPAY OUR MATURING BORROWING OF US DOLLAR 15 MM DUE ON 3/27/84, BUT THAT WE CANNOT DO SO WITHOUT VIOLATING THE MORATORIUM STOP WE WILL REPAY THE INTEREST DUE OF USD 388,645.83 ON 3/27 STOP WE ARE PRESENTLY MAKING REPRESENTATIONS WITH THE CENTRAL BANK ON THE ISSUE OF THIRD PARTY BORROWINGS, AND WILL ADVISE YOU UPON RECEIPT OF CB APPROVAL TO REPAY ABOUT 45 P.T. OF OUR THIRD PARTY BORROWINGS STOP IN THE MEANTIME, WE REITERATE OUR REQUEST TO RENEW THE ABOVE PRINCIPAL AMOUNT FOR

ONE WEEK VALUE 3/27/84 to 4/3/84 STOP AS WE HAVE GENERALLY BEEN PAYING A PREMIUM OF 1 1/8 PCT. ABOVE INTERBANK RATES TO REFLECT PHILIPPINE SOVEREIGN RISK, WE ARE OFFERING TO PAY YOU THE SAME PREMIUM STOP PLEASE TELEX REPLY TO 63732 OR 64464 ATTENTION A.M.V. JALANDONI/S.S. CIPRIANO STOP THANKS AND REGARDS FULL STOP

SANDY CIPRIANO/EURODES
63732 CITIBK PN

PLS RCVD BY?

WELL RECEIVED AND WILL REVERT

OK TKS FRIEND
*427205A MMBFMD . . .
*033.8

Mar. 26, 1984

TELEX FROM THE PHILIPPINE MINISTER OF FINANCE, REPUBLIC OF THE PHILIPPINES, AND THE GOVERNOR, CENTRAL BANK OF THE PHILIPPINES, TO CITIBANK, N.A., DATED OCTOBER 15, 1983

CONFIDENTIAL

NYMBG
.TRFNYCB
TEST NR
TLS0503 ITS JCR754 IN 15/13:04 OUT 15/13:33
NYIBG
.ITTEXCB 151732
MESSAGE 00001:52178 10/15/83 12:57:57(NYT)

TO: USC130 CITIBANK, NA
INTERNATIONAL DEPT-NYC-
14TH FL
FROM: USM014 MINISTER OF FINANCE,
REP. OF PHILIPPINES
GOVERNOR, CTRL BK
OF PHILIPPINES
SUBJ: PHILIPPINES

ATTENTION: R. HUBER/J. COLLINS
B. WEHRMAN/E. FILAMOR

FROM: THE MINISTER OF FINANCE,
REPUBLIC OF THE PHILIPPINES
PHILIPPINES
THE GOVERNOR, CENTRAL BANK
OF THE PHILIPPINES

RE: THE PHILIPPINES

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1. THE INTERNATIONAL RECESSION THAT STARTED IN 1979 HAS SEVERELY AFFECTED THE ECONOMIES OF MANY DEVELOPING COUNTRIES. THE PHILIPPINES HAS NOT BEEN SPARED THE CONSEQUENCES OF LOW COMMODITY PRICES AND ADVERSE TERMS OF TRADE, FALLING WORLD TRADE, HIGH INTEREST RATES AND TIGHTNESS IN THE WORLD CAPITAL MARKETS.

2. THE CAPITAL MARKETS SITUATION HAS BEEN EXACERBATED BY A GENERAL NERVOUSNESS ARISING OUT OF THE SEVERE LIQUIDITY PROBLEMS FACING SOME INTERNATIONAL BORROWERS, PARTICULARLY SINCE THE LATTER PART OF 1982. THE TIGHTNESS OF WORLD CAPITAL MARKETS HAS LED TO INCREASED RELIANCE ON TRADE AND SHORT TERM FINANCING AND TO PROGRESSIVELY SHORTER MATURITIES OF EXTERNAL DEBT OF PHILIPPINE OBLIGORS.

3. THE PHILIPPINES HAS BEEN FINANCING ITS 1983 BALANCE OF PAYMENTS DEFICIT MAINLY FROM THE PROCEEDS OF A STAND-BY ARRANGEMENT WITH THE INTERNATIONAL MONETARY FUND AND FROM THE RESERVES OF THE CENTRAL BANK AND THE DOMESTIC BANKING SYSTEM. THIS WAS IN THE EXPECTATION OF IMPROVEMENT IN THE CURRENT ACCOUNT. IMPROVEMENT HAS IN FACT TAKEN PLACE DURING 1983, BOTH RELATIVE TO 1982 AND PROGRESSIVELY OVER THE PAST THREE QUARTERS, DUE TO THE MEASURES ADOPTED TO STIMULATE INFLOWS AND DAMPEN OUTFLOWS. THE CAPITAL ACCOUNT, HOWEVER, SHOWED A SUBSTANTIAL AND UNANTICIPATED SHORTFALL DURING THE THIRD QUARTER AND IS EXPECTED TO SHOW FURTHER SHORTFALLS

IN THE PRESENT QUARTER. THE DOMESTIC FINANCIAL SECTOR HAS EXPERIENCED SIMILAR WITHDRAWAL OF LIQUIDITY, RESULTING IN SEVERE AND RAPID LOSS OF INTERNATIONAL RESERVES.

4. BECAUSE THE RESERVE DRAIN SERIOUSLY ACCELERATED IN THE PAST SEVEN WEEKS, WE ARE THEREFORE REQUESTING A ROLLOVER FOR 90 DAYS FROM MATURITY OF EXTERNAL INDEBTEDNESS OF PHILIPPINE OBLIGORS THAT FALLS DUE IN THE 90-DAY PERIOD COMMENCING OCTOBER 17, 1983. DETAILS ARE DESCRIBED BELOW.

5. THIS REQUEST IS BEING MADE AS A MEANS OF HELPING TO STABILIZE THE FINANCIAL SITUATION AND TO PERMIT A CAREFUL ASSESSMENT OF AVAILABLE OPTIONS AND IMPLEMENTATION OF FURTHER CORRECTIVE MEASURES. IT IS BEING MADE AFTER CONSULTATION WITH CERTAIN BANKS AND WITH THE INTERNATIONAL MONETARY FUND.

6. IN ADDITION TO THE ADJUSTMENT MEASURES TAKEN EARLIER THIS YEAR IN THE CONTEXT OF AN IMF AGREEMENT, THE GOVERNMENT HAS TAKEN FURTHER MEASURES EXPECTED TO TURN AROUND THE BALANCE OF PAYMENTS: (A) LAST WEEK, THE PESO WAS DEPRECIATED BY 21.4 PERCENT AGAINST THE US DOLLAR, (B) THE GROWTH RATE IN CREDIT IS BEING FURTHER MODERATED, (C) FURTHER REDUCTION IN THE 1983 AND 1984 GOVERNMENT BUDGETARY DEFICIT, (D) IMPROVEMENT IN PUBLIC ENTERPRISE FINANCES AND (E) FURTHER CURTAILMENT OF PUBLIC INVESTMENT PLANS TO EASE PRESSURE ON THE CURRENT ACCOUNT AND THUS REDUCE

INTERNATIONAL FINANCING NEEDS. THE RECENT CURRENCY DEPRECIATION IS A KEY ADJUSTMENT MEASURE THAT IS CONSIDERED BOTH POSITIVE AND APPROPRIATE TO BRING ABOUT A DRAMATIC BALANCE OF PAYMENTS IMPROVEMENT.

7. DISCUSSIONS ARE UNDERWAY TO OBTAIN TERM FINANCING FROM OFFICIAL DEVELOPMENT ASSISTANCE SOURCES, NOTABLY (A) AN EXPORT FINANCING FACILITY FROM THE WORLD BANK, (B) AN AGRICULTURAL STRUCTURE ADJUSTMENT LOAN FROM THE WORLD BANK, (C) U.S. EXIMBANK EXPORT CREDITS, AND (D) POSSIBLE ACCELERATION OF APPROVED ECONOMIC SUPPORT FUND APPROPRIATIONS FROM THE UNITED STATES GOVERNMENT.

8. THE PHILIPPINES HAS HAD A SERIES OF STAND-BY AGREEMENTS WITH THE IMF, COMMENCING IN THE LATE 1960'S. THE CURRENT AGREEMENT FOR 1983, PROVIDES FOR SDR315 MILLION IN THE FORM OF A STAND-BY FACILITY AND SDR189 MILLION IN THE FORM OF A COMPENSATORY FACILITY. THE MID-TERM REVIEW PROVIDED FOR UNDER THE AGREEMENT IS NOW UNDERWAY. WE ARE NOW ENGAGED IN NEGOTIATIONS WITH THE FUND WITH THE AIM OF REACHING AN AGREEMENT WHICH WILL TRANSFORM AND EXPAND THE PRESENT ARRANGEMENT. IN THIS CONNECTION, THE IMF STAFF AND MANAGEMENT HAVE DECIDED TO MOVE AHEAD WITH NEGOTIATIONS FOR A 1984 STAND-BY AGREEMENT. WE ARE CONFIDENT THAT AGREEMENT WILL BE REACHED IN THE NEXT FEW WEEKS.

9. A TOTAL OF SDR289 MILLION (SDR100 MILLION STAND-BY FACILITY AND SDR189 MILLION COM-

PENSATORY FINANCING FACILITY) HAS BEEN DRAWN FROM THE IMF OUT OF THE 1983 AGREEMENT AND THE BALANCE OF SDR215 MILLION IS SCHEDULED FOR DRAWING BETWEEN NOW AND FEBRUARY 1984. AN ADDITIONAL AMOUNT OF SDR400 MILLION IS EXPECTED THROUGH 1984, CONTINGENT AS USUAL ON THE AVAILABILITY OF IMF RESOURCES.

10. FINANCIAL PROJECTIONS ARE NOW BEING PREPARED IN CONSULTATION WITH THE IMF, TAKING INTO ACCOUNT THE EXISTING INTERNATIONAL AND PHILIPPINE DOMESTIC SITUATION.

11. THE 90-DAY EXTENSION IS REQUESTED ON OBLIGATIONS TO FOREIGN FINANCIAL INSTITUTIONS, INCLUDING OBU'S, AS FOLLOWS:

A. PUBLIC SECTOR:

ALL EXTERNAL PUBLIC SECTOR DEBT FALLING DUE IN THE 90-DAY PERIOD COMMENCING ON OCTOBER 17, 1983 WILL BE EXTENDED FOR 90-DAYS. INTEREST WILL BE PAID ON A CURRENT BASIS. THE MARGIN OVER PRIME OR LIBOR FOR THE DETERMINATION OF THE RATE OF INTEREST ON SUCH EXTERNAL INDEBTEDNESS WILL BE THE HIGHER OF: (A) THE CONTRACTUAL RATE OF SUCH EXTERNAL DEBT OR (B) DEPENDING ON THE EXISTING RATE BASIS, 1 PERCENT OVER PRIME OR 1⅛ PERCENT OVER LIBOR. PUBLIC SECTOR DEBT SHALL INCLUDE DEBT OF THE CENTRAL BANK OF THE PHILIPPINES, PHILIPPINE NATIONAL BANK, DEVELOPMENT BANK OF THE PHILIPPINES AND LAND BANK OF THE PHILIPPINES.

B. PRIVATE FINANCIAL SECTOR:

ALL FORMS OF EXTERNAL DEBT OWED TO FOREIGN FINANCIAL INSTITUTIONS (INCLUDING BUT NOT LIMITED TO DEBT DOCUMENTED AS LOANS, ADVANCES, DEPOSITS, PESO CURRENCY SWAPS OR GUARANTEES) FALLING DUE IN THE 90-DAY PERIOD WILL BE EXTENDED FOR 90 DAYS. GOVERNMENT CONTROLLED PRIVATE COMMERCIAL BANKS AND PHILIPPINE BRANCHES OF FOREIGN BANKS WILL BE CONSIDERED PRIVATE FINANCIAL SECTOR INSTITUTIONS. PRICING ON ALL PRIVATE FINANCIAL SECTOR OBLIGATIONS WILL CONTINUE TO BE NEGOTIATED BY THE BORROWER AND THE INTERNATIONAL BANK.

C. PRIVATE CORPORATE SECTOR:

WE REQUEST THAT EITHER (A) ALL DEBT TO FOREIGN FINANCIAL INSTITUTIONS BE ROLLED OVER WITH THE ORIGINAL OBLIGOR FOR 90 DAYS (PRICING TO BE DETERMINED BY OBLIGOR AND INTERNATIONAL BANK) OR (B) WITH THE CONSENT OF BOTH THE INTERNATIONAL BANK AND THE LOCAL COMPANY, THE LOCAL COMPANY WILL BE ALLOWED TO DEPOSIT WITH THE CENTRAL BANK SUFFICIENT PESOS TO COVER THE PRINCIPAL PAYMENT (AT THE EXCHANGE RATE OF THE DAY). IN CASE (B), THE INTERNATIONAL INSTITUTION WILL RECEIVE THE FOREIGN CURRENCY OBLIGATION OF THE CENTRAL BANK OF THE PHILIPPINES IN LIEU OF THE PRIVATE CORPORATE SECTOR OBLIGATION. THE DEBT WILL THEN BE EXTENDED FOR 90 DAYS WITHIN THE BOUNDARIES OF THE 90-DAY EXTENSION REQUEST FOR THE PUBLIC SECTOR. FOR PURPOSES OF THE 90-DAY EXTENSION REQUEST, 343/547 HOLD-OUT DEPOSITS WILL BE CONSIDERED IN THE PRIVATE CORPORATE SECTOR.

12. OTHER MATTERS:

A. WE REQUEST THAT DURING THE CONTINUANCE OF THE EXTENSION PERIOD THE RATE BASIS CURRENTLY IN EFFECT WITH RESPECT TO A CREDIT IN ANY SECTOR SHALL CONTINUE THROUGHOUT THE PERIOD WITHOUT CHANGE FOR THE PURPOSES OF THE STANDSTILL.

B. THE PROPOSED EXTENSION WITH RESPECT TO ALL SECTORS OF THE ECONOMY WILL NOT INCLUDE:

(I) DIRECT LOANS FROM OR LOANS GUARANTEED BY FOREIGN EXPORT CREDIT AGENCIES,

(II) LOANS FROM OFFICIAL AGENCIES, SUCH AS THE WORLD BANK AND ASIAN DEVELOPMENT BANK, AND FOREIGN CENTRAL BANKS, AND

(III) PUBLICLY OFFERED AND/OR REGISTERED SECURITIES, WHICH ARE NOT GUARANTEED OR OTHERWISE SUPPORTED BY FOREIGN FINANCIAL INSTITUTIONS.

C. DURING THE 90-DAY EXTENSION PERIOD, THE PHILIPPINES EXPECTS TO COMPLETE NEGOTIATION OF ITS FINANCING PLAN FOR THE REMAINDER OF 1983 AND 1984 WITHIN THE UMBRELLA OF THE IMF STAND-BY ARRANGEMENT WHICH IS UNDER DISCUSSION. THE PARAMETERS OF THE PLAN ARE STILL UNDETERMINED PENDING THE FORMALIZATION OF THE LETTER OF INTENT WITH THE INTERNATIONAL MONETARY FUND WHICH WE EXPECT TO BE FORTHCOMING WITHIN THE NEXT THREE OR FOUR WEEKS.

13. TRADE:

TRADE-RELATED FINANCINGS HAVING AN ORIGINAL AND UNMATURED TENOR OF 360 DAYS OR LESS FROM THE DATE ON WHICH THEY WERE INITIATED SHALL BE EXCLUDED FROM THE STANDSTILL ARRANGEMENT. AS TRADE-RELATED FINANCINGS ARE REPAID, THE BANKS WOULD BE EXPECTED TO OPEN NEW CREDIT ACCOMMODATION FOR AN EQUIVALENT AMOUNT, WHEN REQUESTED.

14. INTERBANK PLACEMENTS:

WE REQUEST THAT THE INTERNATIONAL BANKING COMMUNITY MAINTAIN THEIR INTERBANK PLACEMENTS TO THE OVERSEAS BRANCHES AND AFFILIATES OF PHILIPPINE BANKS AT THEIR CURRENT LEVEL.

IN ORDER TO FACILITATE COMMUNICATIONS WITH OUR MANY CREDITORS AROUND THE WORLD, WE HAVE FORMED AN ADVISORY COMMITTEE OF BANKS. REGIONAL CONTACTS IN THE ADVISORY COMMITTEE WILL BE COMMUNICATED TO YOU EARLY NEXT WEEK. THE ADVISORY COMMITTEE MEMBERS ARE:

MANUFACTURERS HANOVER TRUST COMPANY, CHAIRMAN
THE BANK OF TOKYO, LTD., DEPUTY CHAIRMAN
BANK OF AMERICA, N.T. AND S.A.
BANK OF MONTREAL
BANQUE NATIONALE DE PARIS
BARCLAYS BANK INTERNATIONAL, LTD.
THE CHASE MANHATTAN BANK, N.A.
CHEMICAL BANK
CITIBANK, N.A.
MORGAN GUARANTY TRUST COMPANY OF NEW YORK

WE LOOK FORWARD TO YOUR POSITIVE RESPONSE AND APPRECIATE YOUR SUPPORT IN WORKING TOWARD A FAVORABLE SOLUTION. WE HAVE REQUESTED GABRIEL SINGSON, SENIOR DEPUTY GOVERNOR AND JUAN QUINTOS, JR., DEPUTY GOVERNOR FOR INTERNATIONAL OPERATIONS, BOTH OF THE CENTRAL BANK OF THE PHILIPPINES, TO CLARIFY ANY ASPECTS OF THIS REQUEST.

JAIME C. LAYA, GOVERNOR, CENTRAL BANK

CESAR E.A. VIRATA,
PRIME MINISTER AND MINISTER OF FINANCE

/Via Inconet/

NNNN
;;; Medic Operator(s) here: 11 ;;;

NEW YORK CLEARING HOUSE COMMENT LETTER ON REGULATION D, DATED JULY 15, 1980 (EXCERPTS PP. 1 AND 19-22)

NEW YORK CLEARING HOUSE
100 Broad Street, New York, N.Y. 10004

JOHN F. LEE
Executive Vice President

July 15, 1980

Anthony Solomon, President
New York Federal Reserve Bank
33 Liberty Street
New York, New York 10045

Re: New York Federal Reserve Bank Circular 8844, dated June 6, 1980. (Reserve Requirements of Depository Institution, FRB Docket No. R-0306)

Dear Mr. Solomon:

I am pleased to enclose this Association's memorandum of comments with respect to Reserve Requirements of Depository Institutions.

We have forwarded a copy directly to the Secretary of the Board of Governors. We expect to file comments subsequently pertaining to certain proposals which were included in your release but which were not mandated by the Monetary Control Act of 1980.

We would be pleased to discuss our comments with you, or with members of your staff, at your convenience.

Very truly yours,

/s/ John F. Lee

Enclosure

July 15, 1980

Anthony Solomon, President
Federal Reserve Bank of New York
33 Liberty Street
New York, New York 10045

Re: Reserve Requirements of
Depository Institutions (Docket No. R-0306)

Dear Mr. Solomon:

We refer to Circular No. 8844 issued by the Federal Reserve Bank of New York on June 6, 1980 setting forth proposed amendments to Federal Reserve Regulation D, in part mandated by the enactment of the Monetary Control Act of 1980 (the "Act"). We are grateful for the opportunity to comment on the changes which the Board is considering. In addition to the comments set out below, several member banks of the New York Clearing House Association are submitting comments separately.

Preliminary Statement

The Association believes that the Board's proposed Regulation D revision for the most part properly and equitably implements the Act. Nevertheless, in our view, some of the proposals reach beyond the requirements of the Act, unnecessarily burdening U.S. financial institutions. We ask the Board to consider carefully the suggestions set forth below to revise these proposals. We are also concerned that additional time be provided, wherever legally possible, to permit more careful

(a) *Foreign Branch Deposits*

An amendment of Section 204.1(c)(4) of proposed Regulation D is required to avoid what we believe is an unintended result. This Section is presumably intended to codify a long standing interpretation by the Federal Reserve Board that deposits at foreign branches of mem-

ber banks are not subjects to reserve requirements (1918 Fed. Res. Bull. 1123; 12 C.F.R. § 204.112). However, the proposed language can be read to apply reserve requirements to all foreign branch deposits.

The problem occurs because the proposed exemption is limited to a

> "deposit that is payable *only* at an office located outside the United States." (Emphasis added.)

This limitation is emphasized by the parenthetical sentence in Section 204.1(c)(4). That sentence provides that a foreign branch deposit is subject to reserve requirements if it can be required to be paid in the United States if not paid at the foreign office.

There are circumstances under which a deposit in a foreign branch could be required to be paid in the United States, although there is neither an intention nor expectation on the part of the depositor or the bank that it will be paid in the United States. While under Section 138 of the New York Banking Law, a depositor in a foreign branch of a U.S. bank bears the "country risk", the home office is not insulated from payment in all events.

One example is illustrative. Assume that there has been a major defalcation at a foreign branch of a U.S. bank so that it has insufficient funds to pay its depositors. In such a case, the depositor could undoubtedly require the home office to make payment. See, *Sokoloff* v. *National City Bank of New York*, 130 Misc. 66, 224 N.Y.S. 102 (1927), aff'd 223 A.D. 754, 227 N.Y.S. 907 (1928), aff'd 250 N.Y. 69, 164 N.E. 745 (1928).

As a result, the proposed wording of the foreign branch exemption in Section 204.1(c)(4) would be unworkable. On the one hand, as a legal matter, a deposit at a foreign branch may under some circumstances be payable at the United States home office if the branch is itself unable to pay the deposit. On the other hand, under the proposed wording, any potential of home office payment

would disqualify the deposit from reserve-exempt treatment. Therefore, no foreign branch deposit would qualify for the exemption.

We believe that this problem can be cured by language which reflects the intention of the parties that the deposit be payable abroad, but likewise accommodates the possibility that, under unusual circumstances, payment may be required in the United States. Section 204.1 (c) (4) could be revised to read as follows:

> "(4) The provisions of this Part do not apply to a deposit that is designated as being payable at an office located outside the United States and as to which no office in the United States has agreed to make payment.

(b) *Definition of Natural Person*

The proposed regulations do not contain a definition of "natural person". The meaning of this term is relevant in determining whether a time account or savings account qualifies for reserve free treatment.

The term undoubtedly includes any individual person. We also assume that it includes a trust, estate or similar arrangement in which the actual benefit interest is held by natural persons. Clarification of this issue is desirable.

(c) *Overdrafts in Demand Deposit Accounts*

Section 204.2(b)(1) states that overdrafts in demand deposit accounts are not to be treated as negative demand deposits and are not to be netted. While that rule may be proper when applied to the netting of one customer's accounts against the accounts of a second customer, we would be deeply concerned if it were intended to prohibit netting of a single customer's accounts. Many customers maintain multiple demand deposit accounts in the same institution. It is proper in those cases to net the accounts and reserve only against the resulting positive balances. Multiple accounts are maintained for legitimate corporate cash management reasons. For example, overdrafts in disbursement accounts are intentionally created with the express understanding that they will be funded with good balances in concentration accounts. Lending arrangements are not contemplated. The regulations should take into consideration the totality of the customer relationship and permit netting out of negative balances where funds are contemporaneously on deposit elsewhere in the bank.

Summary and Conclusion

The Act which these regulations implement has been characterized as the most important banking legislation since the 1930's. Three Congresses spent time formulating its provisions. Indeed, some of the changes stem from The Report of the President's Commission on Financial Structure and Regulation published in December 1971. Accordingly, we urge careful consideration of our recommendations for revision and that the comment period be extended for revisions not mandated by the Act. We also request that the institutions which must comply be given adequate time to reorder their accounting and recordkeeping facilities to meet the final requirements.

THE NEW YORK CLEARING HOUSE ASSOCIATION

The Bank of New York
The Chase Manhattan Bank, N.A.
Citibank, N.A.
Chemical Bank
Morgan Guaranty Trust Company of New York
Manufacturers Hanover Trust Company
Irving Trust Company
Bankers Trust Company
Marine Midland Bank
United States Trust Company of New York
National Bank of North America
European American Bank & Trust Company

MORGAN GUARANTY TRUST COMPANY COMMENT LETTER ON REGULATION D, DATED JULY 14, 1980 (EXCERPTS PP. 1 AND 13-14)

Morgan Guaranty Trust Company
of New York

Comments on proposed Regulation D
of the Board of Governors of the
Federal Reserve System

(Docket No. R-0306)

We believe Regulation D in its proposed form goes a long way toward meeting the objectives of the Monetary Control Act of 1980—reduced regulatory costs and burdens and a greater degree of competitive equity in financial markets, but without adverse implications for the conduct of monetary policy or the soundness of the nation's banking system. We do have some suggestions, however, and in that connection wish particularly to highlight our concern (discussed in some detail under "Eurodollar Reserve Requirements") with any reimposition of reserve requirements on Eurodollar loans to U.S. residents and the damaging effects of such an action on the competitive position of American banks.

Nonpersonal Time Deposits—Maturities

The Board's proposal to shorten to 14 days the present 30-day minimum maturity for a time deposit has considerable merit. The instruments in money markets here credits as functional equivalents of cash items in the process of collection (i.e. deductible until collected).

We also recommend that there be a delay of approximately six months in the effective date of any change in the treatment of interbank balances in order to provide banks with adequate time to complete necessary systems changes. Banks will need to begin identifying that portion of their cash items in process of collection that have been received from other banks. As such cash items are collected, a correspondent would convert the deferred availability balance to a nonreservable "due to" its respondent.

Deposits Payable at an Office Outside the United States

We are concerned with the overly broad language in Section 204.1(c)(4) dealing with foreign branch deposits.

A 1970 ruling of the Federal Reserve Board (Published Interpretations of the Board of Governors, par. 2730) concluded that reserve requirements apply to foreign branch deposits which in effect have been guaranteed by a domestic office in the event the foreign branch is precluded from making payment. The Board based its ruling on the view that a customer at a foreign branch "assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals." The proposed language in Section 204.1(c)(4), however, does not adequately take into account that there are situations (other than those contemplated by the 1970 ruling) in which a domestic office could be required to make payment. For example, if a foreign branch did not make payment to its depositor for reasons unrelated to any action by the foreign country in which it is located, a domestic office might be required to pay the deposit. Nevertheless, in the absence of a guaranty or other agreement to pay on the part of the domestic office, such a deposit should not be subject to reserve requirements.

We suggest, therefore, that the proposed language be revised to conform more closely to the Board's existing

ruling in this area. Specifically, we recommend the following language in place of proposed Section 204.1 (c)(4):

> "The provisions of this Part do not apply to any deposit that is payable at an office located outside the United States and which no domestic office has agreed to pay."

Respectfully submitted,

Morgan Guaranty Trust Company
of New York

New York, N.Y.
July 14, 1980

LETTER FROM THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM TO D. E. HAYNES AND J. M. HOOVER, DATED APRIL 3, 1987

[SEAL]

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
Washington, D.C. 20551

April 3, 1987

Duncan E. Haynes, Esq.
Jessica M. Hoover, Esq.
Brobeck, Phleger & Harrison
Spear Street Tower
One Market Plaza
San Francisco, California 94105

Dear Mr. Haynes and Ms. Hoover:

This is pursuant to our telephone conversations concerning the Wells Fargo/Citibank litigation. I express no opinion on the merits of that case.

However, this is to confirm that Regulation D, 12 C.F.R. Part 204, and published Board interpretations and staff opinions concerning Regulation D do not prohibit repayment of deposits or excuse their nonpayment. Nor do they prohibit a transfer of funds between branches to effect repayment.

Further, section 204.1(c)(5) of Regulation D provides that Regulation D does not apply to any "deposit that is payable only at an office located outside the United States." Section 204.2(t) of Regulation D provides that

> "Any deposit that is payable only at an office located ouside the United States" means (1) a deposit of a United States resident that is in a denomination of $100,000 or more, and as to which the depositor

> is entitled, under the agreement with the institution, to demand payment only outside the United States or (2) a deposit of a person who is not a United States resident as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States. (Footnotes omitted).

Under these provisions, deposits payable only at a particular office outside the United States are not subject to reserve requirements. This is true even if the depository institution may be contractually obligated to obtain funds in order to pay the deposit from another office of the depository institution located outside the United States.

This letter makes no representation concerning future amendments or interpretations of Regulation D that may be adopted by the Board or Board staff.

Very truly yours,

/s/ Oliver Ireland
OLIVER IRELAND
Associate General Counsel

cc: JOHN HUFFMAN

SUPPLEMENTAL AFFIDAVIT OF R. B. BUENAVENTURA ON HIS DEALINGS WITH THE CENTRAL BANK OF THE PHILIPPINES, AND MAAB NO. 47, SWORN TO FEBRUARY 26, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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84 Civ. 996 (WK)

WELLS FARGO ASIA LIMITED
Plaintiff,

-against-

CITIBANK, N.A.
Defendant.

SUPPLEMENTAL
AFFIDAVIT OF
RAFAEL B. BUENAVENTURA

REPUBLIC OF THE PHILIPPINES
CITY OF MANILA
CONSULATE OF THE UNITED STATES OF AMERICA.

RAFAEL B. BUENAVENTURA, being duly sworn, states:

1. I am a Senior Vice President of Citibank, N. A. and the Country Corporate Officer for Citibank in the Philippines ("Citibank Manila"). As such, I am in charge of all Citibank activities in the Philippines, including credit and treasury operations. I have been dealing directly with the Central Bank of the Philippines (the "Central Bank") on behalf of Citibank Manila for

several years and am familiar with the facts and circumstances surrounding the issuance and implementation of Memorandum to Authorized Agent Banks ("MAAB") No. 47. I submit this supplemental affidavit to provide a more detailed description of my conversations and dealings with the Central Bank of the Philippines (the "Central Bank") and its prohibition against payment of the deposits frozen by MAAB No. 47.

2. In the fall of 1983, the Philippines experienced severe economic difficulties that have been widely publicized in the world press. In the context of what is commonly referred to as the "international debt crisis", the Philippines was the first nation in Asia to experience such serious financial problems of such a serious nature as to require the rescheduling of its debt.

3. On October 15, 1983, the Governor of the Central Bank, Jaime C. Laya, and the Prime Minister and Minister of Finance, Cesar E. A. Virata, sent a telex to the international financial community (the "Standstill Telex") (attached as Exhibit 1). The Standstill Telex, which was sent to Citibank and other financial institutions that had made foreign currency loans to Philippine entities, explained that a severe "international recession" had affected the Philippines, causing a "severe and rapid loss of international reserves". Exhibit 1 at 1. The Standstill Telex also explained that the Philippines lacked sufficient foreign currency reserves to meet its foreign debt obligations. The Standstill Telex requested foreign financial institutions to extend maturing obligations on all forms of external public and private sector debts falling due in the 90-day period beginning on October 17, 1983, including deposits of foreign financial institutions. *See* Exhibit 1 at 3, ¶ 11B.

4. It was clear to me personally and, based on conversations I had with other banks both inside and outside of the Philippines, I also know that it was clear to the international community as a whole, that, although the

Standstill Telex was worded "request", its intention and effect was to declare a moratorium on payment of external debt. This meant that payment of external debt whether foreign currency deposits or otherwise, was prohibited until more permanent solutions to the Philippine debt crisis could be found.

5. In order to implement the moratorium on repayment of foreign currency obligations owed to foreign financial institutions, the Central Bank issued MAAB No. 47 (attached as Exhibit 2). MAAB No. 47 provided that principal on external obligations to foreign banks and other financial institutions could not be repaid without prior Central Bank approval. MAAB No. 47 also required that total obligations to foreign financial institutions not be reduced without prior Central Bank approval, and imposed sanctions on banks failing to "strictly comply" with its terms.

6. Citibank Manila is an "authorized agent bank" subject to the structures of MAAB No. 47 and other local laws. Failure to adhere to MAAB No. 47 would have subjected Citibank Manila to sanctions, including the possible revocation of its license to operate in the Philippines. Besides Citibank Manila, there are three other foreign-owned banks that operate as local banks in the Philippines. They are also subject to MAAB No. 47 and other local laws.

7. On October 15, 1983, expanding upon MAAB No. 47, the Central Bank issued MAAB No. 48 (attached as Exhibit 3). MAAB No. 48 required all banks to report to the Central Bank all deposits of foreign banks. As part of its enforcement of the moratorium on external payments, on October 17, Central Bank examiners began to monitor total outstandings of Citibank Manila. Jovino Fermin, a Central Bank examiner, along with four assistants, reviewed Citibank Manila's books and records. Their declared purpose was to ensure that Citibank Manila had not made any payments on account deposits

such as those in this case which would reduce its total obligations. Mr. Fermin and his assistants have continued to examine Citibank Manila every month since the issuance of MAAB No. 47 to ensure Citibank Manila's continued compliance with the moratorium.

8. In my discussions with the Central Bank starting in October, 1983, I was informed that the object and effect of the Standstill Telex and MAAB No. 47 were to block payments of foreign exchange from the Philippines; however, it was also apparent that some foreign currency outflow would be necessary to purchase vital commodities such as oil, food and medicine. Therefore, within two weeks of the issuance of the Standstill Telex and MAAB No. 47, the Central Bank formed a committee to deal with issues relating to the moratorium and to establish a system for the remittance of foreign exchange for top priority imports. The Committee consisted of 7 representatives of the Central Bank and 7 representatives of commercial banks, including Citibank Manila, 5 Philippine banks and another branch of a non-Philippine. This committee was and is known as the Joint Central Bank-Bankers Association Philippines Committee on Foreign Exchange Priorities (the "Committee").

9. On November 4, 1983, the Central Bank issued Circular No. 970 (attached as Exhibit 4). Circular No. 970 required banks to surrender all foreign exchange to the Central Bank. The purpose of this requirement was to create a pool for "meeting payments in accordance with a priority system that shall provide for (1) oil imports, (2) official development assistance loans, (3) trade related payments for (a) imports to export products, (b) raw materials for vital domestic industries and (c) food grain, (4) interest on bank loans, (5) interbank loans and trade related credits".

10. Four days later, the Central Bank issued Operating Guidelines No. 1 to Circular No. 970 (attached as Exhibit 5), prohibiting payments except for transactions

falling within a narrower list of priorities: oil imports, raw materials and spare parts for export products, grain imports and raw materials for vital domestic industries, such as medical supplies. The Operating Guidelines also provided that "(a)ny and all exceptions shall require the prior approval of the Central Bank on recommendation of (the Committee)".

11. Following the issuance of the Standstill Telex and MAAB No. 47 in mid-October, 1983, I was in daily contact with the Central Bank regarding the moratorium. It is the customary practice in dealing with bank regulators in the Philippines to discuss informally the meaning and effect of Central Bank regulations with Central Bank representatives before taking affirmative actions under those regulations. In October and November, on at least three separate occasions, I met with the Governor of the Central Bank, at that time Jaime C. Laya, regarding MAAB No. 47. Each of these meetings took place in Governor Laya's office or elsewhere in the Central Bank. During each meeting I raised the subject of the foreign currency deposits and sought clarification of the meaning of MAAB No. 47. Governor Laya repeatedly and consistently stated that, in accordance with the requirements of the Standstill Telex, foreign currency deposits placed by foreign financial institutions with Citibank Manila were frozen and that no payment would be allowed.

12. In the light of these conversations and my experience in dealing with the Central Bank, I was convinced that the Central Bank would not entertain individual requests for repayment of foreign currency deposits and that any specific request for approval to repay foreign currency deposits would be denied. Although MAAB No. 47 was worded in terms of Central Bank prior approval, it was not this simple. The Standstill Telex had already effectively prohibited repayment of all external debt. MAAB NO. 47 was intended to prohibit—and did prohibit—repayment of foreign currency deposits until more

permanent solutions to the Philippine debt crisis could be found.

13. From my discussion with representatives of —— —— I know that my understanding of MAAB No. 47 was shared ——— international banking community in the Phillippines and elsewhere. In —— I believe that Wells Fargo Bank and Wells Fargo Asia Limited ("WF Asia"), as sophisticated banks with substantial operations in the international finanicial market and in all probability involved in other debt restructurings, also understood that the deposits were frozen by the Standstill Telex and MAAB No. 47. For example, in a telex from the Central Bank to WF Asia's successor (Wells Fargo Latin American Bank Cayman Islands) regarding repayment of foreign currency deposits placed with a Philippine branch of a foreign bank (attached as Exhibit A to the McAmis Reply Affidavit), the Central Bank stated its concern regarding any "net outflow of foreign currency from the Philippines". Because repayment of the deposits would have resulted in a net outflow of foreign currency from the Philippines, WF Asia knew or should have known that the Central Bank would not permit Citibank Manila to repay the deposits in this case with Philippine assets.

14. In an effort to resolve the Philippine financial difficulties, an Advisory Committee of Philippine creditors was formed and Restructuring Principles were drafted (copy attached as Exhibit 6). The Restructuring Principles expressly call for the restructuring of private financial sector debt, including foreign currency deposits. *See* Exhibit 6 at 8. Thus, the Restructuring Principles confirm that foreign currency deposits were frozen and could not be repaid with Philippine assets.

15. Even though it was and remains abundantly clear to me that the Central Bank would not permit Citibank Manila to repay the deposits frozen by the Standstill Telex and MAAB No. 47, I believed that I could make

a persuasive argument to the Central Bank for using Citibank Manila's non-Philippine assets to repay a portion of its external obligations. Therefore, in an effort to repay the foreign currency deposits to the fullest extent possible, I began discussion with the Central Bank in December of 1983 concerning the possibility of repaying a percentage of the deposits using Citibank Manila's non-Philippine assets.

16. While these discussions were under way, Jose Fernandez replaced Jaime C. Laya as Governor of the Central Bank on January 19, 1984. When Mr. Fernandez took over as Governor, I had to re-explain Citibank Manila's request to the new Governor and his assistance. The new Governor then reviewed the background data relating to the payment of deposits with external assets, including the extent of Citibank Manila's non-Philippine assets. This change in leadership of the Central Bank further delayed Central Bank action for even a limited approval to repay the frozen deposits.

17. After further discussions with the new Governor and others in the Central Bank, I sent a letter on February 20, 1984 to the Central Bank officially requesting approval to use Citibank Manila's non-Philippine assets to repay a portion of the frozen deposits (copy attached as Exhibit 7). In the letter, I again specifically asked the Central Bank to notify Citibank Manila as soon as approval was granted to repay the rest of the deposits. At the beginning of April, 1984, the Central Bank finally granted approval to repay the deposits, but only to the extent of Citibank Manila' non-Philippine assets.

18. The Central Bank has not approved the remittance by Citibank Manila of any additional funds from the Philippines to repay the remaining portion of foreign currency deposits. Nor has the Central Bank approved the remittance of any additional funds from the Philippines by any other bank similarly situated.

19. Meanwhile, WF Asia brought this suit in New York. Faced with the conflict between MAAB No. 47's prohibition on repayment and WF Asia's demand for repayment in this case, on April 24, 1984, Citibank commenced an action in the Regional Trial Court in the Philippines (copy attached as Exhibit 8). Citibank brought suit not only against WF Asia but also the Central Bank, thereby seeking to bring all of the relevant parties before the court. Citibank sought a declaratory judgment as to the rights and obligations of the parties under MAAB No. 47 and other Philippine law. Although Citibank sought to pursue the Philippine declaratory judgment action, WF Asia requested this Court to enjoin the Philippine action. A conference was held before this Court, and the parties agreed to a stay of the Philippine action pending resolution of the non-Philippine law issues in this case. (*See* Affidavit of John E. Hoffman, Exhibit 4 at 11-12, 19-21 dated January 21, 1985).

20. I believe that my colleagues at Citibank Manila and I did everything possible under the circumstances to obtain the prior approval of the Central Bank to repay the deposits in this case. I am still convinced that the Central Bank considered and considers the deposits frozen and will not, at this time, entertain or grant further requests by Citibank Manila for approval to repay the deposits.

/s/ Rafael B. Buenaventura
RAFAEL B. BUENAVENTURA

Sworn to before me
this 26 day of February, 1985

/s/ [Illegible]
Notary Public

CENTRAL BANK OF THE PHILIPPINES
MANILA

Office of the Senior Deputy Governor

MEMORANDUM TO AUTHORIZED AGENT BANKS

Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours in New York City on October 14, 1983, shall not be reduced without prior Central Bank approval.

These measures shall apply to payments value dated during the period October 17, 1983 to January 16, 1984.

Appropriate sanctions shall be imposed on banks which fail to strictly comply with this directive.

FOR THE MONETARY BOARD:

/s/ Gabriel C. Singson
GABRIEL C. SINGSON
Senior Deputy Governor

MAAB No. 47

October 15, 1983

EXHIBIT 1 TO AFFIDAVIT OF R. B. BUENAVENTURA: STANDSTILL TELEX, DATED OCTOBER 15, 1983

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10/15/83 12:57:57 (NYT)

TO: USC130 CITIBANK, NA
INTERNATIONAL DEPT-NYC-14TH FL

FROM: USM014
MINISTER OF FINANCE, REP. OF PHILIPPINES
GOVERNOR, CTRL BK OF PHILIPPINES

SUBJ: PHILIPPINES

ATTENTION: R. HUBER/J. COLLINS/B. WEHRMAN/E. FILAMOR

FROM: THE MINISTER OF FINANCE, REPUBLIC OF THE PHILIPPINES, PHILIPPINES
THE GOVERNOR, CENTRAL BANK OF THE PHILIPPINES

RE: THE PHILIPPINES

1. THE INTERNATIONAL RECESSION THAT STARTED IN 1979 HAS SEVERLY AFFECTED THE ECONOMIES OF MANY DEVELOPING COUNTRIES. THE PHILIPPINES HAS NOT BEEN SPARED THE CONSEQUENCES OF LOW COMMODITY AND ADVERSE TERMS OF TRADE, FALLING WORLD

TRADE, HIGH INTEREST RATES AND TIGHTNESS IN THE WORLD CAPITAL MARKETS.

2. THE CAPITAL MARKETS SITUATION HAS BEEN EXACERBATED BY A GENERAL NERVOUSNESS RISING OUT OF THE SEVERE LIQUIDITY PROBLEMS FACING SOME INTERNATIONAL BORROWERS, PARTICULARLY SINCE THE LATTER PART OF 1982. THE TIGHTNESS OF WORLD CAPITAL MARKETS HAS LED TO INCREASED RELIANCE ON TRADE AND SHORT TERM FINANCING AND TO PROGRESSIVELY SHORTER MATURITIES OF EXTERNAL DEBT OF PHILIPPINE OBLIGORS.

3. THE PHILIPPINES HAS BEEN FINANCING ITS 1983 BALANCE OF PAYMENTS DEFICIT MAINLY FROM THE PROCEEDS OF A STAND-BY ARRANGEMENT WITH THE INTERNATIONAL MONETARY FUND AND FROM THE RESERVES OF THE CENTRAL BANK AND THE DOMESTIC BANKING SYSTEM. THIS WAS IN THE EXPECTATION OF IMPROVEMENT IN THE CURRENT ACCOUNT. THE IMPROVEMENT HAS IN FACT TAKEN PLACE DURING 1983, BOTH RELATIVE TO 1982 AND PROGRESSIVELY OVER THE PAST THREE QUARTERS, DUE TO THE MEASURES ADOPTED TO STIMULATE INFLOWS AND DAMPEN OUTFLOWS. THE CAPITAL ACCOUNT, HOWEVER, SHOWED A SUBSTANTIAL AND UNANTICIPATED SHORTFALL DURING THE THIRD QUARTER AND IS EXPECTED TO SHOW FURTHER SHORTFALLS IN THE PRESENT QUARTER. THE DOMESTIC FINANCIAL SECTOR HAS EXPERIENCED SIMILAR WITHDRAWAL OF LIQUIDITY, RESULTING IN SEVERE AND RAPID LOSS OF INTERNATIONAL RESERVES.

4. BECAUSE THE RESERVE DRAIN SERIOUSLY ACCELERATED IN THE PAST SEVEN WEEKS, WE ARE THEREFORE REQUESTING A ROLLOVER FOR 90 DAYS FROM MATURITY OF EXTERNAL INDEBTEDNESS OF PHILIPPINE OBLIGORS THAT FALLS DUE IN THE 90-DAY PERIOD COMMENCING OCTOBER 17, 1983. DETAILS ARE DESCRIBED BELOW.

5. THIS REQUEST IS BEING MADE AS A MEANS OF HELPING TO STABILIZE THE FINANCIAL SITUATION AND TO PERMIT A CAREFUL ASSESSMENT OF AVAILABLE OPTIONS AND IMPLEMENTATION OF FURTHER CORRECTIVE MEASURES. IT IS BEING MADE AFTER CONSULTATION WITH CERTAIN BANKS AND WITH INTERNATIONAL MONETARY FUND.

6. IN ADDITION TO THE ADJUSTMENT MEASURES TAKEN EARLIER THIS YEAR IN THE CONTEXT OF AN IMF AGREEMENT, THE GOVERNMENT HAS TAKEN FURTHER MEASURES EXPECTED TO TURN AROUND THE BALANCE OF PAYMENTS: (A) LAST WEEK, THE PESO WAS DEPRECIATED BY 21.4 PERCENT AGAINST THE US DOLLAR, (B) THE GROWTH RATE IN CREDIT IS BEING FURTHER MODERATED, (C) FURTHER REDUCTION IN THE 1983 AND 1984 GOVERNMENT BUDGETARY DEFICIT, (D) IMPROVEMENT IN PUBLIC ENTERPRISE FINANCES AND (E) FURTHER CURTAILMENT OF PUBLIC INVESTMENT PLANS TO EASE PRESSURE ON THE CURRENT ACCOUNT AND THUS REDUCE INTERNATIONAL FINANCING NEEDS. THE RECENT CURRENCY DEPRECIATION IS A KEY ADJUSTMENT MEASURE THAT IS CONSIDERED BOTH POSITIVE AND APPROPRIATE TO BRING ABOUT A DRAMATIC BALANCE OF PAYMENTS IMPROVEMENT.

7. DISCUSSIONS ARE UNDERWAY TO OBTAIN TERM FINANCING FROM OFFICIAL DEVELOPMENT ASSISTANCE SOURCES, NOTABLY (A) SUPPORT FINANCING FACILITY FROM THE WORLD BANK, (B) AN AGRICULTURAL STRUCTURAL ADJUSTMENT LOAN FROM THE THE WORLD BANK, (C) U.S. EXIMBANK EXPORT CREDITS, AND (D) POSSIBLE ACCELERATION OF APPROVED ECONOMIC SUPPORT FUND APPROPRIATIONS FROM THE UNITED STATES GOVERNMENT.

8. THE PHILIPPINES HAS HAD A SERIES OF STANDBY AGREEMENTS WITH THE IMF, COMMENCING IN THE LATE 1960'S. THE CURRENT AGREEMENT FOR 1983, PROVIDES FOR SDR315 MILLION IN THE FORM OF A STAND-BY FACILITY AND SDR189 MILLION IN THE FORM OF A COMPENSATORY FACILITY. THE MID-TERM REVIEW PROVIDED FOR UNDER THE AGREEMENT IS NOW UNDERWAY. WE ARE NOW ENGAGED IN NEGOTIATIONS WITH THE FUND WITH THE AIM OF REACHING AN AGREEMENT WHICH WILL TRANSFORM AND EXPAND THE PRESENT ARRANGEMENT. IN THIS CONNECTION, THE IMF STAFF AND MANAGEMENT HAVE DECIDED TO MOVE AHEAD WITH NEGOTIATIONS FOR A 1984 STAND-BY AGREEMENT. WE ARE CONFIDENT THAT AGREEMENT WILL BE REACHED IN THE NEXT FEW WEEKS.

9. A TOTAL OF SDR289 MILLION (SDR100 MILLION STAND-BY FACILITY AND SDR189 MILLION COMPENSATORY FINANCING FACILITY) HAS BEEN DRAWN FROM THE IMF OUT OF THE 1983 AGREEMENT AND THE BALANCE OF SDR215 MILLION IS SCHEDULED FOR DRAWING BETWEEN NOW AND FEBRUARY 1984. AN ADDITIONAL AMOUNT OF SDR400

MILLION IS EXPECTED THROUGH 1984, CONTINGENT AS USUAL ON THE AVAILABILITY OF IMF RESOURCES.

10. FINANCIAL PROJECTIONS ARE NOW BEING PREPARED IN CONSULTATION WITH THE IMF, TAKING INTO ACCOUNT THE EXISTING INTERNATIONAL AND PHILIPPINE DOMESTIC SITUATION.

11. THE 90-DAY EXTENSION IS REQUESTED ON OBLIGATIONS TO FOREIGN FINANCIAL INSTITUTIONS, INCLUDING OBU'S, AS FOLLOWS:

A. PUBLIC SECTOR:

ALL EXTERNAL PUBLIC SECTOR DEBT FALLING DUE IN THE 90-DAY PERIOD COMMENCING ON OCTOBER 17, 1983 WILL BE EXTENDED FOR 90-DAYS. INTEREST WILL BE PAID ON A CURRENT BASIS. THE MARGIN OVER PRIME OR LIBOR FOR THE DETERMINATION OF THE RATE OF INTEREST ON SUCH INTERNAL INDEBTEDNESS WILL BE THE HIGHER OF: (A) THE CONTRACTUAL RATE ON SUCH EXTERNAL DEBT OR (B) DEPENDING ON THE EXISTING RATE BASIS, 1 PERCENT OVER PRIME OR 1¼ PERCENT OVER LIBOR. PUBLIC SECTOR DEBT SHALL INCLUDE DEBT OF THE CENTRAL BANK OF THE PHILIPPINES, PHILIPPINE NATIONAL BANK, DEVELOPMENT BANK OF THE PHILIPPINES AND LAND BANK OF THE PHILIPPINES.

B. PRIVATE FINANCIAL SECTOR:

ALL FORMS OF EXTERNAL DEBT OWED TO FOREIGN FINANCIAL INSTITUTIONS (INCLUDING BUT NOT LIMITED TO DEBT DOCUMENTED AS LOANS, ADVANCES, DEPOSITS, PESO CURRENCY SWAPS OR GUARANTEES) FALLING DUE IN THE 90-DAY PERIOD WILL BE EXTENDED FOR 90 DAYS. GOVERNMENT

CONTROLLED PRIVATE COMMERCIAL BANKS AND PHILIPPINE BRANCHES OF FOREIGN BANKS WILL BE CONSIDERED PRIVATE FINANCIAL SECTOR INSTITUTIONS. PRICING ON ALL PRIVATE FINANCIAL SECTOR OBLIGATIONS WILL CONTINUE TO BE NEGOTIATED BY THE BORROWER AND THE INTERNATIONAL BANK.

C. PRIVATE CORPORATE SECTOR:

WE REQUEST THAT EITHER (A) ALL DEBT TO FOREIGN FINANCIAL INSTITUTIONS BE ROLLED OVER WITH THE ORIGINAL OBLIGOR FOR 90 DAYS (PRICING TO BE DETERMINED BY OBLIGOR AND INTERNATIONAL BANK) OR (B) WITH THE CONSENT OF BOTH THE INTERNATIONAL BANK AND THE LOCAL COMPANY, THE LOCAL COMPANY WILL BE ALLOWED TO DEPOSIT WITH THE CENTRAL BANK SUFFICIENT PESOS TO COVER THE PRINCIPAL PAYMENT (AT THE EXCHANGE RATE OF THE DAY). IN CASE (B), THE INTERNATIONAL INSTITUTION WILL RECEIVE THE FOREIGN CURRENCY OBLIGATION OF THE CENTRAL BANK OF THE PHILIPPINES IN LIEU OF THE PRIVATE CORPORATE SECTOR OBLIGATION. THE DEBT WILL THEN BE EXTENDED FOR 90 DAYS WITHIN THE BOUNDARIES OF THE 90-DAY EXTENSION REQUEST FOR THE PUBLIC SECTOR FOR PURPOSES OF THE 90-DAY EXTENSION REQUEST, 343/547 HOLD-OUT DEPOSITS WILL BE CONSIDERED IN THE PRIVATE CORPORATE SECTOR.

12. OTHER MATTERS:

A. WE REQUEST THAT DURING THE CONTINUANCE OF THE EXTENSION PERIOD THE RATE BASIS CURRENTLY IN EFFECT WITH

RESPECT TO CREDIT IN ANY SECTOR SHALL CONTINUE THROUGHOUT THE PERIOD WITHOUT CHANGE FOR THE PURPOSES OF THE STANDSTILL.

B. THE PROPOSED EXTENSION WITH RESPECT TO ALL SECTORS OF THE ECONOMY WILL NOT INCLUDE:

(I) DIRECT LOANS FROM OR LOANS GUARANTEED BY FOREIGN GOVERNMENT EXPORT CREDIT AGENCIES,

(II) LOANS FROM OFFICIAL AGENCIES, SUCH AS THE WORLD BANK AND ASIAN DEVELOPMENT BANK, AND FOREIGN CENTRAL BANKS, AND

(III) PUBLICLY OFFERED AND/OR REGISTERED SECURITIES, WHICH ARE NOT GUARANTEED OR OTHERWISE SUPPORTED BY FOREIGN FINANCIAL INSTITUTIONS.

C. DURING THE 90-DAY EXTENSION PERIOD, PHILIPPINES EXPECTS TO COMPLETE NEGOTIATION OF ITS FINANCING PLAN FOR THE REMAINDER OF 1983 AND 1984 WITHIN THE UMBRELLA OF THE IMF STAND-BY ARRANGEMENT WHICH IS UNDER DISCUSSION. THE PARAMETERS OF THE PLAN ARE STILL UNDETERMINED PENDING THE FORMALIZATION OF THE LETTER OF INTENT WITH THE INTERNATIONAL MONETARY FUND WHICH WE EXPECT TO BE FORTHCOMING WITHIN THE NEXT THREE OR FOUR WEEKS.

13. TRADE:

TRADE-RELATED FINANCINGS HAVING AN ORIGINAL AND UNMATURED TENOR OF 360 DAYS OR LESS FROM THE DATE ON WHICH THEY WERE INITIATED SHALL BE EXCLUDED FROM THE STANDSTILL ARRANGEMENT.

AS TRADE-RELATED FINANCINGS ARE REPAID, THE BANKS WOULD BE EXPECTED TO OPEN NEW CREDIT ACCOMMODATION FOR AN EQUIVALENT AMOUNT, WHEN REQUESTED.

14. INTERBANK PLACEMENTS:

WE REQUEST THAT THE INTERNATIONAL BANKING COMMUNITY MAINTAIN THEIR INTERBANK PLACEMENTS TO THE OVERSEAS BRANCHES AND AFFILIATES OF PHILIPPINE BANKS AT THEIR CURRENT LEVEL.

IN ORDER TO FACILITATE COMMUNICATIONS WITH OUR MANY CREDITORS AROUND THE WORLD, WE HAVE FORMED AN ADVISORY COMMITTEE OF BANKS. REGIONAL CONTACTS IN THE ADVISORY COMMITTEE WILL BE COMMUNICATED TO YOU EARLY NEXT WEEK. THE ADVISORY COMMITTEE MEMBERS ARE:

MANUFACTURERS HANOVER TRUST COMPANY, CHAIRMAN
THE BANK OF TOKYO, LTD., DEPUTY CHAIRMAN
BANK OF AMERICA, N.T. AND S.A.
BANK OF MONTREAL
BANQUE NATIONALE DE PARIS
BARCLAYS BANK INTERNATIONAL, LTD.
THE CHASE MANHATTAN BANK, N.A.
CHEMICAL BANK
CITIBANK, N.A.
MORGAN GUARANTY TRUST COMPANY OF NEW YORK

WE LOOK FORWARD TO YOUR POSITIVE RESPONSE AND APPRECIATE YOUR SUPPORT IN WORKING TOWARD A FAVORABLE SOLUTION. WE HAVE REQUESTED GABRIEL SINGSON, SENIOR DEPUTY GOVERNOR AND JUAN QUINTOS, JR., DEPUTY GOVERNOR FOR INTER-

NATIONAL OPERATIONS, BOTH OF THE CENTRAL BANK OF THE PHILIPPINES, TO CLARIFY ANY ASPECTS OF THIS REQUEST.

JAIME C. LAYA
GOVERNOR, CENTRAL BANK

CESAR E.A. VIRATA
PRIME MINISTER AND MINISTER OF FINANCE

VIA INCONET/

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;;; Medic Operator(s) were: 11 ;;;

EXHIBIT 2 TO AFFIDAVIT OF R. B. BUENAVENTURA: MAAB NO. 48, DATED OCTOBER 15, 1983

CENTRAL BANK OF THE PHILIPPINES
MANILA

Office of the Senior Deputy Governor

MEMORANDUM TO AUTHORIZED AGENT BANKS

In connection with Memorandum to Authorized Agent Banks No. 47 dated October 15, 1983, authorized agent banks are requested to instruct their branches and other offices outside the Philippines:

1. To submit to Central Bank of the Philippines thru the Management of External Debt and Investment Accounts Department on or before October 18, 1983, a schedule of loans, advances, placements and deposits of foreign banks and financial institutions with such branches and other offices as of the end of business hours in New York City on October 14, 1983, specifying the creditor/depositor, bank and financial institutions, amounts and their corresponding due dates.

2. To refer to their respective Head Offices and the Central Bank of the Philippines all demands for payment of the above enumerated items.

/s/ Gabriel C. Singson
GABRIEL C. SINGSON
Senior Deputy Governor

MAAB No. 48

October 15, 1983

EXHIBIT 3 TO AFFIDAVIT OF R. B. BUENAVENTURA: CIRCULAR 970, DATED NOVEMBER 4, 1983

BANK OF THE PHILIPPINES

Office of the Governor

CIRCULAR NO. 970
Series of 1983

Pursuant to Monetary Board Resolution No. 1850 dated November 4, 1983 and pursuant to Section 74 of R.A. 265, as amended, Circular No. 966 is hereby amended to read as follows:

"1. All Banks shall sell to the Central Bank all foreign exchange receipts from merchandise exports, services, transfers, over-the-counter transactions, and other similar receipts as soon as these are received by the Bank.

2. The amount generated shall be constituted into a pool for the purpose of meeting payments in accordance with a priority system that shall provide for (1) oil imports, (2) official development assistance loans, (3) trade related payments for (a) inputs to export products, (b) raw materials for vital domestic industries and (c) food grains, (4) interest on bank loans, (5) interbank loans and trade related credits.

3. The utilization of cash balances and other liquid assets shall observe the same priority system established pursuant to this Circular.

4. This Circular shall not apply to receipts from deposits under Circulars 343 and 547, which may be retained by banks as provided for under said Circulars.

5. The ceiling on foreign exchange holdings provided under MAAB 42 is hereby suspended for the duration of the effectivity of this Circular.

6. The implementation of the provisions of this Circular shall follow guidelines established by the Central Bank in coordination with duly designated representatives of the Bankers Association of the Philippines.

7. The total cooperation of all banks and bank offices is expected as the response of the financial system to the urgent needs of the country."

This Circular takes effect November 4, 1983.

/s/ Jamie C. Laya
JAMIE C. LAYA
Governor

November 4, 1983

EXHIBIT 4 TO AFFIDAVIT OF R. B. BUENAVENTURA: RESTRUCTURING PRINCIPLES

RESTRUCTURING PRINCIPLES

I. RESTRUCTURING PERIOD; DEBT TO BE RESTRUCTURED.

RESTRUCTURING PERIOD:

October 17, 1983 through December 31, 1986.

SPECIFIED DEBT:

Specified debt means the principal portion of:

(1) All indebtedness for borrowed money or the deferred purchase price of property, and all deposit liabilities,

(2) Owed to a bank or financial institution,

(3) Payable in a currency other than the currency of the Republic of the Philippines,

(4) Maturing during the period from October 17, 1983 through December 31, 1986,

(5) But not including excluded debt.

EXCLUDED DEBT:

The following categories of debt are excluded from the restructuring:

(1) Publicly-issued bonds and Yen denominated registered private placements.

(2) Floating rate certificates of deposit and notes including floating rate notes, if not beneficially held by a financial institution in its portfolio.

(3) Loans made by official multilateral entities, such as World Bank and A.D.B.

(4) Spot and forward foreign exchange contracts (excluding Peso-Dollar swaps) and precious metal contracts.

(5) Obligations under commodity hedging lines (including, but not limited to, margin calls with respect to such lines).

(6) Lease obligations in respect of movable property.

(7) Outstandings (including trade-related arrears) and central bank overdrafts covered by the revolving short term trade facility.

(8) Financings, secured by legally recognized security interests in ships, aircraft, and other movable tangible assets.

(9) Interbank placements in the foreign agencies, subsidiaries and branches of Philippine (public and private) banks.

(10) That portion of loans made, guaranteed or insured by official non-Philippine agencies, including the undivided portion of the guaranteed or insured part of such loans with respect to which the creditor must continue to retain the credit risk.

(11) New credit facilities initially extended after October 17, 1983.

II. PUBLIC SECTOR.

DEBT TO BE RESTRUCTURED:

All specified debt of public sector obligors falling due during the restructuring period, and all specified debt of other obligors guaranteed by a public sector obligor if such guarantee is called during the restructuring period. (Central bank overdrafts will be considered as a part of the revolving short term trade facility.)

METHOD:

TRANCHE A: Restructuring of maturities falling due between October 17, 1983 and December 31, 1985 will become effective on the effective date of each individual restructuring agreement.

TRANCHE B: Restructuring of maturities falling due between January 1, 1986 and December 31, 1986 will become effective on the first date after December 31, 1985 on which the following conditions have been satisfied: (I) the Philippine government has made the purchases under its IMF program that were conditioned upon compliance with the performance criteria applicable to September 30, 1985, (II) the performance criteria under the IMF program through March 31, 1986 have been established, (III) The Philippines has requested its official lenders, insurers and guarantors to reschedule, on terms at least as favorable to the Philippines as those governing the rescheduling of the debt owing to foreign financial institutions, the amounts falling due between January 1, 1986 and December 31, 1986 in respect of debt lent, guaranteed or insured by non-Philippine official agencies, (IV) no event of default constituted by failure to pay when due any principal or interest is in existence under the new money facility agreement or any public sector restructuring agreement and (V) the majority lenders have not determined that the restructuring of the Tranche B maturities shall not become effective because of the existence of an event of default under the new money facility agreement or any public sector restructuring agreement (other than any event of default described in the foregoing clause (IV)).

(Tranche A debt and Tranche B debt will be reconciled at the same time, and the restructuring of Tranche B debt will become effective upon the satisfaction of the conditions set forth above).

OBLIGOR:

To remain with the original public sector obligors, except that the debt of some of the smaller public sector obligors may be consolidated to reduce somewhat the number of public sector restructuring agreements to be signed.

GUARANTOR:

Republic of the Philippines.

EXCHANGE AVAILABILITY:

The Central Bank will agree to provide foreign exchange availability.

CURRENCY:

Each lender will choose at date of signing of each restructuring agreement either to have its debt remain in the original currency or to switch up to 100 percent of its debt, on the reconciliation date under such restructuring agreement, into (I) domestic or Eurocurrency in either U.S. dollars or the currency of the home office of the lender or the lender's parent (limited to Canadian dollars, Swiss Francs, Deutsche Mark, Pounds Sterling, Japanese Yen and other mutually acceptable currencies) or (II) European currency units. The currency of Tranche B maturities under any restructuring agreement may not be switched until the later of (I) the reconciliation date under such restructuring agreement or (II) the first interest payment to occur after the restructuring of such Tranche B maturities has become effective.

TENOR:

10 years from the earlier of signing date or December 31, 1984, with 5 years grace. The obligations will be repayable in 11 equal semi-annual installments.

INTEREST RATE:

$1\frac{5}{8}$ percent over Libor or over the comparable domestic pricing (which in the case of U.S. dollars will be the "adjusted CD rate"). This interest rate will become effective (I) on the first interest payment date after January 1, 1985 for maturities falling due between October 17, 1983 and December 31, 1985 and (II) on the effective date for the 1986 restructuring of maturities falling due in 1986.

Libor pricing for currencies other than U.S. dollars will be the same as U.S. dollar Libor pricing. Domestic interest margins for currencies other than U.S. dollars will be appropriately adjusted if the domestic reference rate for such currencies is not comparable to that for U.S. dollars.

Existing fixed rate lenders to have a one-time option of the same floating rate election as described above or to continue on a fixed rate basis at a rate to be negotiated with the obligor to provide a yield comparable to floating rate options.

TAXES AND OTHER DEDUCTIONS:

Payments to be made free and clear of all taxes or withholdings. Tax receipts to be provided.

MANDATORY PREPAYMENT:

Mandatory prepayment provisions will be negotiated.

CONDITIONS PRECEDENT:

Restructuring agreements for each obligor to cover substantially all specified debt of such obligor and other customary conditions precedent. Compliance with provisions of new money facility agreement.

COVENANTS AND EVENTS OF DEFAULT:

The restructuring agreements will contain customary covenants and events of default including covenants

and events of default under the new money facility. Each restructuring agreement will contain a cross-default to all external indebtedness (including guarantees) of the public sector (including, without limitation, the Republic of the Philippines and the Central Bank). Exceptions to be negotiated.

GENERAL:

All subject to general condition that satisfactory documentation of containing normal provisions for Eurocurrency financings and unique provisions appropriate for this financing be executed.

The original obligor would agree to reimburse all reasonable and documented expenses, including fees and disbursements of New York and Philippine counsel to the advisory committee. An agency fee will be separately negotiated between the servicing bank and the original obligor.

Each restructuring agreement shall contain the foregoing basic terms and shall be substantially identical in all other respects except for language changes necessary to reflect the special business of the particular obligor provided that such changes do not alter the basic terms.

GOVERNING LAW AND JURISDICTION:

New York law. Each obligor and guarantor will consent to the nonexclusive jurisdiction of competent courts in New York, London and the Philippines and in the jurisdiction in which the principal office of the relevant servicing bank is located. Each obligor and guarantor will appoint an agent for service of process in England and in New York.

WAIVER OF IMMUNITY:

Each obligor and guarantor will waive all immunities, sovereign or otherwise, from suit, attachment

(including pre-judgment attachment) and/or execution of judgment which it or its properties now enjoy or may enjoy in the future.

SERVICING BANKS:

To be designated for each public sector restructuring agreement.

III. PRIVATE FINANCIAL SECTOR.

DEBT TO BE RESTRUCTURED:

All specified debt of private financial sector obligors falling due during the restructuring period. (FCDU's will be permitted to negotiate, on a non-discriminatory basis, alternative arrangements with their creditors, *Provided* That (I) completion of any such arrangements shall be subject to the prior written approval of the Central Bank; (II) such arrangement shall occur only so long as it does not cause the Philippines to be out of compliance with its IMF program; and (III) it will be an event of default under the new money facility agreement and under the public sector restructuring agreements if the level of FCDU short term deposit balances constituting specified debt falls below the current level of outstandings other than by repayment on the same basis as restructured private financial sector debt having an original tenor equivalent to the original tenor of such FCDU deposits.)

A. SHORT TERM.

SHORT TERM OBLIGATION:

Any obligation which (I) has an original maturity of one year or less after the date of incurrence thereof and (II) by its terms is not renewable or extendable, at the option of the obligor, to a date more than one year after the date of incurrence thereof.

OBLIGORS:

Each lender will choose at the time of signing one of the following options in respect of the short-term specified debt owing to it by a private financial sector obligor:

(A) Such lender may (with the concurrence of the obligor) elect to retain the credit risk of the original obligor, in which case the obligations will be restructured for a tenor of four years less five days; notwithstanding the foregoing, any such obligor may (with the concurrence of the lender) elect to pay its short-term specified debt obligations to such lender in accordance with the stated maturity, in which case the obligor shall, on each such stated maturity date, deliver to the Central Bank the peso equivalent of the maturing amount (such peso equivalent to be determined on the date of such delivery), and such delivery shall result in the creation of a dollar deposit obligation of the Central Bank to the lender having the same terms, conditions and tenor as the restructured medium term debt of the public sector; or

(B) Such lender may give notice to the original obligor and to the Central Bank to the effect that such obligor will be required to deliver to the Central Bank the peso equivalent of its short term obligations to such lender, whereupon the obligor and the Central Bank will agree upon an amortization schedule (over a period of time not to exceed 4 years less 5 days) during which the obligor shall deliver to the Central Bank such peso equivalent (determined at the exchange rate in effect on the date of such delivery), and during such period of time, such obligor shall continue to be obligated to pay interest semi-annually to the lender on account of such obligation at the rate of 1⅝ percent

above libor. The delivery by the original obligor to the Central Bank of the pesos in accordance with the maturity schedule so agreed in accordance with the preceding sentence shall result in the creation of a dollar deposit obligation of the Central Bank to the lender, which deposit obligation shall be created upon the same terms, conditions and tenor as the medium term debt of the public sector. At any time during the time period so agreed for the delivery of pesos, the lender may, upon the request of the Central Bank, agree to the assumption by another entity, acceptable to the lender, of the obligations owing to the lender by such original obligor. If at the end of the time period so agreed upon for the peso delivery, the original obligor (or the successor thereof) has not made the required peso delivery to the Central Bank, the lender may, at its option, require the assumption or purchase, by the Central Bank or another entity designated by the Central Bank and acceptable to the lender, of the obligations owing to the lender by such original obligor, whereupon such obligations shall be restructured upon the same terms and conditions as other restructured debt of the Central Bank (or the other entity that has assumed or purchased such obligation).

Prior to such assumption or purchase, any failure by the private financial sector obligor to pay when due and in the appropriate foreign currency any interest amount due to the lender shall constitute an event of default under the new money facility agreement on the thirtieth calendar day after the Central Bank has been given notice that such obligor has failed to pay such interest.

CURRENCIES:

Each lender will choose at date of signing to either have its debt remain in the original currency or to switch up to 100 percent of its debt, at the first interest payment date following the date of signing, into (I) domestic or Eurocurrency in either U.S. dollars or the currency of the home office of the lender or the lender's parent (limited to Canadian dollars, Swiss francs, Deutsche mark, pounds sterling, Japanese yen and other mutually acceptable currencies) or (II) European currency units.

TENOR:

Four years less five days from December 31, 1984 (for debt in respect of which the lender retains the credit risk of the original obligor.)

INTEREST RATE:

To be agreed between lender and obligor. The public sector restructuring agreements will contain a covenant by the lenders not to charge a margin of more than 2 percent on short-term private financial sector debt in respect of which the lender retains the credit risk of the original obligor.

B. MEDIUM TERM.

METHOD:

At maturity, the original obligor (other than any obligor which is an affiliate of a foreign lender) will deposit pesos with the Central Bank, and the debt will be restructured with the same terms, conditions and maturities as the restructured public sector debt. Each foreign lender which is an affiliate of a Philippine financial sector obligor, and which is a holder of foreign currency deposit obligations of such

obligor, shall enter into an agreement with such obligor not to withdraw such foreign currency deposits during the term of the proposed restructuring agreement except on the same basis as the rescheduled maturities of public sector debt. Each obligor referred to in the preceding sentence shall regularly certify to the Central Bank that such obligor and the holder of its foreign currency deposit obligations have not violated the withdrawal limitations contained therein.

EFFECTIVENESS OF RESTRUCTURING:

Restructuring of maturities falling due between October 17, 1983 and December 31, 1985 will become effective upon the deposit with the Central Bank of the peso equivalent of such maturities. Restructuring of maturities falling due between January 1, 1986 and December 31, 1986 will become effective upon the deposit with the Central Bank of the peso equivalent of such maturities and only after the effectiveness of the restructuring of 1986 maturities of public sector debt.

IV. PRIVATE CORPORATE SECTOR.

OBLIGORS:

The lender will retain the credit risk of the original obligors and will restructure directly with such obligor.

STATEMENT OF INTENT:

An objective of the Government of the Republic of the Philippines is to ensure the viability of the private corporate sector. This will be accomplished through, among other things, a program under which foreign exchange risk protection is provided with respect to current and

future maturities of private corporate sector debt. This program will be self-funded and in broad outlines will have features similar to the Mexican Ficorca Program.

V. CIRCULAR 343 DEPOSITS WITH HOLD-OUTS.

METHOD:

The lender will establish a direct dollar-credit relationship with the private corporate sector obligor. The debt will then be restructured upon the same basis as other private corporate sector debt.

VI. OTHER PERMISSIBLE RESTRUCTURINGS.

It shall be permissible for lenders and obligors in respect of excluded debt, if they choose in their discretion to do so, to agree to restructure excluded debt; such restructurings, if any, may be upon terms similar to or different from the terms set forth above.

EXHIBIT 5 TO AFFIDAVIT OF R. B. BUENAVENTURA: LETTER FROM R. B. BUENAVENTURA TO THE CENTRAL BANK OF THE PHILIPPINES, DATED FEBRUARY 20, 1984

CITIBANK

Rafael B. Buenaventura
Senior Vice President

February 20, 1984

Governor Jose Fernandez
Central Bank of the Philippines

Dear Governor Fernandez:

As a result of the moratorium declared on October 14, 1983 and the subsequent actions of the Central Bank, Citibank Manila has been prevented from repaying U.S. Dollar deposits placed with it by foreign banks prior to that date.

We are anxious to try to resolve this situation and we propose that the Central Bank approve our repayment pro rata of deposits from foreign lenders (excluding Citibank) to the extent of Citibank Manila's offshore placements of $298 million, which level we are currently maintaining in accordance with the moratorium, of our total borrowings of $638 million as of October 14, 1983. We have had continuing dialogue with the Chairman of the Advisory Committee and this action would have no impact on the base for new borrowings. We would undertake to have agreement in principle with the Advisory Committee through its Chairman to insure that snags and misunderstandings are not encountered as a result of this "unfreezing". We would appreciate receiving your authorization to Citibank Manila to make these payments from its offshore placements.

We would also appreciate your advising us as soon as you are in a position to approve remittance of foreign exchange from the Philippines for repayment of principal on the balance of Citibank Manila's deposits from foreign banks as of October 14, 1983.

Very truly yours,

/s/ R. B. Buenaventura

EXHIBIT 6 TO AFFIDAVIT OF R. B. BUENAVENTURA: PETITION FOR DECLARATORY RELIEF, FILED BY CITIBANK IN THE REGIONAL TRIAL COURT IN THE PHILIPPINES, DATED APRIL 23, 1984

REGIONAL TRIAL COURT
MAKATI, METRO MANILA BRANCH

SP. Civil Case No. 7087

CITIBANK, N.A.,
Petitioner,
—versus—

WELLS FARGO ASIA LIMITED
and CENTRAL BANK OF THE PHILIPPINES,
Respondents.

PETITION FOR DECLARATORY RELIEF

COMES NOW THE PETITIONER, through the undersigned Counsel, and to this Honorable Court, most respectfully alleges that:

1. This is a proceeding for declaratory relief under Rule 64 of the Rules of Court to determine the question of construction and application of, and for a declaration on, the Petitioner's obligations and duties under Memorandum to Authorized Agent Banks ("MAAB") No. 47 hereinafter referred to.

2. Petitioner is a United States bank, duly licensed to do business in the Philippines, and with offices therein situated at Citibank Center, Paseo de Roxas, Makati, Metro Manila.

3. Respondent Wells Fargo Asia Limited ("WF Asia"), is a financial institution organized and existing under the laws of Singapore, with principal offices at 801-802 Octagon, 105 Cecil Street, Singapore, where it may be served with summons and other court processes by extra-territorial service in accordance with Section 17, Rule 14 of the Revised Rules of Court.

4. Respondent Central Bank of the Philippines ("Central Bank") is a body corporate organized under Republic Act No. 265, as amended, of the Republic of the Philippines, with principal offices at Central Bank Building Complex, Mabini Street, Metro Manila, where it may be served with summons and other court processes.

5. In June 1983, WF Asia placed two foreign currency time deposits denominated in U.S. dollars with the Petitioner's Manila Branch ("Manila Branch"), said deposits to mature on December 9 and 12, 1983.

6. On October 15, 1983, in connection with, and as part of, the standstill request provided in the October 14, 1983 telex of the Minister of Finance and Governor of the Central Bank of the Philippines to the international banking community, MAAB No. 47 was issued by the Central Bank and thereupon took effect. MAAB No. 47 prohibited banks from remitting amounts in respect of deposits of foreign banks and financial institutions without prior Central Bank approval. The first paragraph of the said MAAB provides as follows:

> "Any remittance of foreign exchange for repayment of principal on all foreign obligations due foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru the Management of Extended Debt and Investment Accounts Department (MEDIAD) for prior approval."

Copies of the aforesaid telex and MAAB No. 47 are hereto attached as Annexes "A" and "B" and made integral parts hereof.

7. The restriction provided in MAAB No. 47 is applicable to payments on foreign currency obligations, including deposit obligations, value dated during the period October 17, 1983 to January 16, 1984. Its application was extended from January 16, 1984 to April 14, 1984 and then from April 14, 1984 to July 14, 1984 and may be further extended thereafter.

8. Upon maturity of its foreign currency deposits with Petitioner's Manila Branch referred to in paragraph 5, WF Asia demanded immediate payment thereof. However, in view of the restriction provided in MAAB No. 47, Petitioner cannot pay the same without prior Central Bank approval. In connection therewith, Petitioner has informed the Central Bank of WF Asia's demand for payment of its deposit, but except as stated in paragraph 9 below, has not received approval to pay such deposits, as required by MAAB No. 47.

9. Subject to certain conditions, respondent Central Bank has authorized repayment pro rata of U.S. Dollar deposits placed with Citibank Manila by non-Philippine banks (including WF Asia but excluding the head office or other branches of Petitioner) to the extent of Citibank Manila's offshore placements.

10. Since Petitioner has not received approval for repayment of the full amount of the WF Asia deposits, the Petitioner's non-payment thereof gives rise to a ripening and continuing dispute and controversy among the parties hereto.

11. Thus, a definitive pronouncement on the effect and application of MAAB No. 47 to the WF Asia deposits is necessary to enable the Petitioner to determine its legal rights and duties.

WHEREFORE, in view of the foregoing premises, Petitioner respectfully prays for a declaratory judgment on its legal rights and duties in light of the conflict between

the demand of WF Asia and the restrictions of MAAB No. 47.

PETITIONER, also prays for such other and further reliefs as this Honorable Court may deem just and equitable under the premises.

Makati, Metro Manila, April 23, 1984.

ACCAOILI & ASSOCIATES
Counsel for the Petitioner
18th Foor, Citibank Center
Paseo de Roxas Makati, Metro Mla.

FOR THE FIRM:

/s/ Alfonso V. Agcaoili
ALFONSO V. AGCAOILI

—and—

/s/ Frumencio A. Lagustan
FRUMENCIO A. LAGUSTAN

COPY FURNISHED:

Solicitor General

Thru: The Office of the Deputy Governor of the Central Bank of the Phils. Central Bank Building Complex Mabini Street, Metro Manila

AFFIDAVIT OF A. V. AGCAOILI ON PHILIPPINE LAW, DATED NOVEMBER 28, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 0996 (WK)

WELLS FARGO ASIA LIMITED,
Plaintiff,
-versus-
CITIBANK, N.A.,
Defendant.

AFFIDAVIT OF ANTONIO V. AGCAOILI

REPUBLIC OF THE PHILIPPINES
CITY OF MANILA
CONSULATE OF THE UNITED STATES OF AMERICA.

ANTONIO V. AGCAOILI, being duly sworn, states:

1. I am a practicing attorney in the Philippines, where I was admitted to the practice of law in 1960. I have received both a Bachelor of Laws degree and a Master in Business Administration degree from the University of the Philippines. I am a member of the Philippine Bar Association and a senior partner of the Manila law firm of Agcaoili & Associates. My firm specializes in corporate, banking, finance and commercial laws and is Counsel in the Philippines for several local banks and the Philippine branches of several foreign banks, including Citibank, N.A. ("Citibank"), Bank of America, NT&SA., Banque Nationale de Paris and Dresdner Bank AG.

2. Since becoming a lawyer 26 years ago, I have practiced in the areas of banking and corporate law. I have advised clients about Philippine banking laws and regulations, including those permitting non-Philippine banks to conduct business in the Philippines, and the operations of the Central Bank of the Philippines (the "Central Bank"), the governmental entity that regulates all banking institutions in the Philippines.

3. I am familiar with the deposits at issue in this litigation (the "Deposits") and have reviewed the confirmations of the Deposits exchanged by the parties. I and other attorneys in my firm working under my supervision have thoroughly researched the issues related to the liability of Citibank's branch in Manila, Philippines ("Citibank Manila") under Philippine law for the unpaid portion of the Deposits.

Application of MAAB No. 47 to Citibank Manila

4. Citibank Manila is a foreign banking institution licensed by the Philippine Government to conduct a banking business in the Philippines. Under the Philippine General Banking Act and the Central Bank Act, foreign banking institutions such as Citibank Manila are subject to the regulatory and supervisory authority of the Central Bank. *See* Exhibits A and B.

5. Under regulations issued by the Central Bank in 1971, Citibank Manila became an "Authorized Agent Bank", which means that Citibank Manila is authorized by the Central Bank to act as its agent with respect to certain foreign currency transactions.

6. On or about October 15, 1983, as part of a program to deal with an economic crisis in the Philippines, the Monetary Board of the Central Bank issued Memorandum to Authorized Agent Banks ("MAAB") No. 47 (attached as Exhibit C). MAAB No. 47 prohibits the repayment of certain foreign currency obligations to for-

eign financial institutions without prior Central Bank approval. MAAB No. 47 states in part:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank . . . for prior approval.

MAAB No. 47 applies to payments value dated during the period October 17, 1983 to January 16, 1984. The Deposits matured during said period and therefore continue to be covered by MAAB No. 47.

7. As an Authorized Agent Bank, Citibank Manila is required to comply with MAAB No. 47. MAAB No. 47 states that sanctions will be imposed on banks that fail to comply with its provisions. As provided in Section 34-A of the Central Bank Act (attached as Exhibit D), sanctions may consist of fines or even a general suspension of Citibank Manila's license to conduct its banking business in the Philippines.

Requests for Central Bank Approval under MAAB No. 47

8. The Central Bank has not established any formal procedures for submitting requests for permission to repay obligations covered by MAAB No. 47. On numerous occasions in the past when the Central Bank has issued regulations requiring prior Central Bank approval for designated actions, it has also issued information regarding procedures to be followed in making a request and prescribed froms for making requests. For example, as part of the Philippine government's 1983 emergency measures, the Central Bank issued MAAB No. 66, which states that the Central Bank would make foreign exchange available to Authorized Agent Banks to service interest payments due on certain foreign obligations. Less than a month after MAAB No. 66 (1983) was issued, the Central Bank issued MAAB No. 4 (1984), which describes the procedures for submitting a request

pursuant to MAAB No. 66 and a form for making such requests. (MAAB Nos. 66 and 4 are attached as Exhibit E). Similarly, when the Central Bank issued MAAB No. 18 (1985) changing the procedures for paying interest, the Central Bank attached the application form for making requests for prior approval of such payments (attached as Exhibit F).

9. No forms of information regarding procedures to be followed in making a request were issued with MAAB No. 47 when it was originally promulgated, and none has been issued to this date. The lack of forms and procedures under MAAB No. 47 is an indication of the Central Bank's intention (i) to discourage requests for repayment and (ii) not to grant such requests if made. The customary practice in such situations is for a bank to initiate an informal dialogue with the Central Bank in order to obtain an indication of the Central Bank's position and concerns before submitting a formal request.

Legal Impossibility under Philippine Law

10. The Philippine Civil Code (the "Code") contains the statutes that govern the rights and liabilities of debtors and creditors under Philippine law. Citibank Manila, as a depositary institution maintaining the Deposits, is a debtor with respect to the Deposits under Philippine law. *See* Civil Code of the Philippines, Art. 1953, 1980 (1949) (attached as Exhibit G).

11. Under the Code, when a debtor's performance is prevented by law, the debtor is excused from liability for non-payment of the debt during the period that performance is legally impossible. The relevant Code articles state:

> Article 1183. Impossible conditions, those contrary to good customs or public policy and those prohibited by law shall annul the obligation which depends upon them . . .

Article 1266. The debtor in obligations to do shall be released when the prestation [performance] becomes legally or physically impossible without the fault of the obligor.

Civil Code of the Philippines, Art. 1183, 1266 (1949) (attached as Exhibit H).

12. Analogizing from these sections, the leading authoritative commentary on the Code explains that temporary legal obstacles will excuse delayed performance until such obstacles are removed (see Exhibit I).

Conclusion

13. Under the foregoing legal principles, MAAB No. 47 creates a legal impossibility that prohibits Citibank Manila from repaying the Deposits without prior Central Bank approval and excuses Citibank Manila's performance until the requisite approval is granted.

/s/ Antonio V. Agcaoili
ANTONIO V. AGCAOILI

SUBSCRIBED AND SWORN to before me this 28th day of November, 1986, affiant exhibited to me his Residence Certificate No. A/B 2308712 issued on February 18, 1986 at Makati, Metro Manila.

/s/ Lorna B. Tolentino
LORNA B. TOLENTINO
Notary Public

EXHIBIT 1 TO AFFIDAVIT OF A. V. AGCAOILI: GENERAL BANKING ACT § 2 AND § 18

GENERAL BANKING ACT

SEC. 2. Only entities duly authorized by the Monetary Board of the Central Bank may engage in the lending of funds obtained from the public through the receipt of deposits of any kind and all entities regularly conducting such operations shall be considered as banking institutions and shall be subject to the provisions of this Act, of the Central Bank Act, and of other pertinent laws. The terms "banking institutions" and "Bank", as used in this Act, of the Central Bank Act, and of other pertinent laws. The terms "banking institutions" and "Bank", as used in this Act, are synonymous and interchangeable and specifically include commercial banks, savings associations, and branches and agencies in the Philippines of foreign banks, mortgage banks, development banks, rural banks, stock savings banks, mortgage banks, development banks, rural banks, stock savings and loan associations, and branches and agencies in the Philippines of foreign banks hereinafter called Philippine branches.

The Monetary Board may regulate the activities of the persons and entities which act as agents of banks in no case may the Monetary Board authorize the drawing of checks against deposits not maintained in banks or branches or agencies thereof. (*As amended by PD No. 71*)

SEC. 18. In all matters not specifically covered by special provisions applicable only to foreign banks, or their branches and agencies in the Philippines, any foreign banking corporation or foreign bank not formed, organized, or existing under the laws of the Philippines but lawfully doing business in the Philippines shall be

bound by all laws, rules, and regulations applicable to domestic banking corporations of the same class, except such laws, rules and regulations as provide for the creation, formation, organization, or dissolution of corporations or as fix the relation, liabilities, responsibilities, or duties of members, stockholders, or officers of corporations to each other or to the corporation.

EXHIBIT 2 TO AFFIDAVIT OF A. V. AGCAOILI: CENTRAL BANK ACT § 2, § 25, AND § 108

CENTRAL BANK ACT

SEC. 2. *Responsibilities and objectives.*—It shall be the responsibility of the Central Bank of the Philippines to administer the monetary, banking, and credit system of the Republic.

It shall be the duty of the Central Bank to use the powers granted to it under this Act to achieve the following objectives:

(a) Primarily to maintain internal and external monetary stability in the Philippines, and to preserve the international value of the peso and the convertibility of the peso into other freely convertible currencies; and

(b) To foster monetary, credit and exchange conditions conducive to a balanced and sustainable growth of the economy. (*As amended by PD No. 72, November 29, 1972*)

SEC. 25. *Creation of the appropriate departments.*—In order to assure the observance of this Act and of other pertinent laws, and of the rules and regulations of the Monetary Board, the Central Bank shall have appropriate supervising and examining departments which shall be charged with the supervision and periodic or special examinations of banking institutions operating in the Philippines, including all Government credit institutions, including their subsidiaries and affiliates, non-bank financial intermediaries, and subsidiaries and affiliates of non-bank financial intermediaries performing quasi-banking functions: *Provided*, That affiliates of banking institutions, non-bank financial intermediaries, and subsidiaries and affiliates of non-bank financial inter-

mediaries performing quasi-banking functions may be subject to special examination if the circumstances so warrant as determined by the Monetary Board. *Provided, further,* That a subsidiary means a corporation more than 50% of the voting stock of which is owned by a banking institution or non-bank financial intermediary, and an affiliate means a corporation which is related or linked to such institution or intermediary through common stockholders or such other factors as may be determined by the Monetary Board. The supervising and/or examining departments shall discharge their responsibilities in accordance with the instructions of the Monetary Board.

The department heads and the examiners of the supervising and/or examining departments are hereby authorized to administer oaths to any director, officer, or employee of any institution under their respective supervision or subject to their examination and to compel the presentation of all books, documents, papers or records necessary in their judgment to ascertain the facts relative to the true condition of any institution as well as the books and records of persons and entities relative to or in connection with the operations, activities or transactions of the institution under examination.

No restraining order or injunction shall be issued by the court enjoining the Central Bank from examining any institution subject to supervision or examination by the Central Bank, unless there is convincing proof that the action of the Central Bank is plainly arbitrary and made in bad faith and the petitioner or plaintiff files with the clerk or judge of the court in which the action is pending a bond executed in favor of the Central Bank, in an amount to be fixed by the court. The restraining order or injunction shall be refused or, if granted, shall be dissolved upon filing by the Central Bank of a bond, which shall be in the form of cash or Central Bank cashier's check, in an amount twice the amount of the bond of the petitioner or plaintiff conditioned that it will

pay the damages which the petitioner or plaintiff may suffer by the refusal or the dissolution of the injunction. The provisions of Rule 58 of the New Rules of Court insofar as they are applicable and not inconsistent with the provisions of this Section shall govern the issuance and dissolution of the restraining order or injunction contemplated in this Section. (*As amended by PD Nos. 72, 1771 and PD No. 1827, Jan. 16, 1981*)

SEC. 108 *Guiding principle.*—The Monetary Board shall use the powers granted to it under the present article and elsewhere in this Act to ensure that the supply, availability and cost of money are in accord with the needs of the Philippine economy and that bank credit is not granted for speculative purposes prejudicial to the national interests. Regulations on bank operations shall be applied to all banks of the same category uniformly and without discrimination. (*As amended by PD No. 72*)

EXHIBIT 3 TO AFFIDAVIT OF A. V. AGCAOILI: CENTRAL BANK ACT § 34A

CENTRAL BANK ACT

SEC. 34-A. *Administrative sanctions on banks.*—The Monetary Board is hereby authorized, at its discretion, to impose upon banking institutions, their directors and/or officers, for any willful delay in the submission of reports or publications thereof as required by law, rules and regulations; any refusal to permit examination into the affairs of the insitution, any willful making of a false statement to the Board or the appropriate supervising and examining department or its examiners, any willful failure or refusal to comply with, or violation of, any banking law or any order, instruction or regulation issued by the Monetary Board, or any order, instruction or ruling by the Governor; or any commission of irregularities, and/or conducting business in an unsafe or unsound manner as may be determined by the Monetary Board, the following administrative sanctions:

(a) Fines not in excess of five hundred pesos a day for each type of violation;

(b) Suspension, or removal of directors and/or officers;

(c) Suspension of rediscounting privileges;

(d) Suspension of lending or foreign exchange operations or authority to accept new deposits or make new investments;

(e) Suspension of interbank clearing privileges; and/or

(f) Suspension of authority to operate.

The Monetary Board may preventively suspend any bank director or officer pending an investigation whenever warranted by the circumstances as determined by the Monetary Board. When the case against the director or officer under preventive suspension is not finally decided by the Central Bank within a period of ninety (90) days after the date of suspension, said director or officer shall be reinstated in his position. *Position*, That when the delay in the disposition of the case is due to the fault, negligence or petition of the director or officer, the period of delay shall not be counted in computing the period of suspension herein provided. *(As amended by PD No. 1827, Jan. 16, 1981)*

The above administrative sanctions need not be applied in the order of their severity.

Except in the appointment of a conservator and proceedings upon insolvency as provided for under Sections 28-A and 29 of this Act, the Governor is authorized to render opinions, decisions, or rulings which shall be final and executory until reversed or modified by the Monetary Board, on matters regarding application on enforcement of banking laws, implementation of Monetary Board regulations, policies or instructions pertaining to institutions supervised by the Central Bank, including their method of accounting or manner of keeping the accounts, books and financial records, and their submission of reports.

The Governor is likewise hereby authorized, at his discretion, to impose upon banking institutions, for any failure to comply with the requirements of law, Monetary Board regulations and policies and/or instructions issued by the Monetary Board or by the Governor, fines not in excess of five hundred pesos a day for each type of violation, the imposition of which shall be final and executory until reversed, modified or lifted by the Monetary Board on appeal.

Administrative sanctions shall be applied to all banks of the same category uniformly and without discrimination. *(As added by PD No. 72, and by BP Blg. 67)*

EXHIBIT 4 TO AFFIDAVIT OF A. V. AGCAOILI: MAAB NO. 66, DATED DECEMBER 28, 1983 AND MAAB NO. 4, DATED JANUARY 11, 1984

Further to Circular No. 970 dated November 4, 1983, the Central Bank of the Philippines shall make available to Authorized Agent Banks foreign exchange required to service interest payments due on foreign obligations to international financial institutions, which interest payments (excluding penalties and other charges, if any) became due and payable on or before November 30, 1983 and to the extent that these are still unpaid.

Non-bank private and public corporate borrowers including the National Government may apply to their respective banks for purchase of foreign exchange to update interest payments to November 30, 1983.

Additional foreign exchange shall be made available in the future to further update interest obligations to foreign banks and to other foreign creditors, as the international reserve situation improves.

Applications for non-bank borrowers shall be coursed through authorized agent banks which shall certify to the Central Bank that the documents accompanying the applications comply strictly with the requirements of this memorandum. These documents include official interest billings and photocopies of pertinent pro-notes and the corresponding remittance details. Completed applications shall be submitted to the CB Treasury. In the case of interest obligations of Philippine banks, applications shall be submitted to the Management of External Debt and Investment Accounts Department, accompanied by the official interest billings of the international financial creditors.

Upon approval of the application, the authorized agent bank shall remit the peso equivalent to the Central Bank,

which will then effect the interest remittance direct to the foreign financial institution. Interest payments already provided forward cover under Circular No. 970 Operating Guidelines No. 3 shall likewise be remitted by the Central Bank to the international financial institution.

This memorandum shall take effect immediately.

/s/ Jaime C. Laya
JAIME C. LAYA
Governor

MAAB No. 66

Date: December 28, 1983

FORM MAAB-66

(NAME OF BANK)

Certification of Interest Due on Foreign Obligations to International
Financial Institutions as of November 30, 1983

This is to certify that the following interest obligations of ______________ are due and payable as of November 30, 1983 and are still unpaid.

Nature of Foreign Obligation [1]	Creditor/ Depositor	Principal Amount Outstanding As of 10.14.03	As of 11.30.83	Date Granted	Due	Interest Due and Payable as of 11.30.83

____
Signature Over Printed Name

[1] Indicate whether deposit, clean advance, etc.

OFFICE OF THE GOVERNOR

MEMORANDUM TO AUTHORIZED AGENT BANKS

Pursuant to MAAB No. 66 dated December 28, 1983, the Central Bank of the Philippines shall sell foreign exchange for pesos to Philippine banks to service their interest payments as provided for under subject MAAB in amounts net of the Central Bank's interest payments due on foreign obligations to the said Philippine banks.

Accordingly, Philippine banks shall submit a certification in the attached prescribed form of the amount of interest payments due on foreign obligations to international financial institutions which became due and payable on or before November 30, 1983 to the extent that these are still unpaid.

Furthermore, MAAB No. 66 is hereby amended such that application for interest payments of both bank and non-bank borrowers shall be coursed thru the Management of External Debt and Investment Accounts Department.

All other provisions of MAAB No. 66 shall remain in force.

This memorandum shall take effect immediately.

/s/ Jaime C. Laya
JAIME C. LAYA
Governor

MAAB No. 4

Date: January 11, 1984

EXHIBIT 5 TO AFFIDAVIT OF A. V. AGCAOILI: MAAB NO. 18, DATED AUGUST 22, 1985

CENTRAL BANK OF THE PHILIPPINES

MANILA

Office of the Governor

MEMORANDUM TO AUTHORIZED AGENT BANK

Please be advised that interest and other charges due to foreign banks and financial institutions may now be remitted as they fall due subject to prior Central Bank approval through Management of External Debt and Investment Accounts Department (MEDIAD). However, interest due on short-term foreign borrowings of commercial banks may be settled directly without prior CB approval.

All applications for remittance shall be filed in accordance with attached form at least five (5) business days before due date and shall be supported by the following documents/information:

1. Name of the authorized agent bank through which remittance will be made.
2. Copy of creditor billing, duly certified by the Senior/Executive Vice-President or officer of equivalent rank of the agent bank.
3. CB loan registration number and/or date of CB approval of each of the loan accounts involved.
4. Date of loan agreement and original amount of the loan.

5. Basis for interest computation showing for each loan account, the balance at the beginning of the interest period, the applicable interest rate (indicating the base rate and the spread if on floating rate basis) and the period covered, if these are not shown in full in the creditor billing.

Interest payments covered by Circular 1071 and 1072, MAAB dated August 9, 1985 and Circular 1045 covering the Paris Club agreed minute shall continue to be governed by said regulations.

/s/ Jose B. Fernandez, Jr.
JOSE B. FERNANDEZ, JR.
Governor

MAAB No. 18

August 22, 1985

MAAB No. ——

August 22, 1985

APPLICATION FOR INTEREST PAYMENTS

1. Name of applicant/borrower:
2. Amount of interest applied for:
3. Period Covered: From ———— To ————
4. Interest rate: —— p.a. (Base: ——; Spread: ——)
5. Balance of loan at beginning of interest period:
6. Name of Creditor:

   (Indicate Name or Agent if syndicated loan)
7. Date of covering loan agreement:
8. Original loan amount:
9. Date of CB approval of the loan:
10. No. and date of CB Registration of loan for MLT Credits:
11. Supporting documents to be attached

    [ ] Copy of creditor billing duly certified by the Senior/Executive, Vice-President or officer of equivalent rank of the agent bank.

    [ ] Others (Specify below if any):

    We hereby certify to the correctness of the above information.

————————————

(Name of Firm)

By:

————————————

(Signature over printed name)

Date: ————————

————————————

Name/Agent Bank

By:

————————————

(Signature over Printed Name)

Date: ————————

EXHIBIT 6 TO AFFIDAVIT OF A. V. AGCAOILI: ARTICLE 1183 OF THE CIVIL CODE OF THE PHILIPPINES

ART. 1183. Impossible conditions, those contrary to good customs of public policy and those prohibited by law shall annul the obligation which depends upon them. If the obligation is divisible, that part thereof which is not affected by the impossible or unlawful condition shall be valid.

The condition not to do an impossible thing shall be considered as not having been agreed upon. (1116a)

EXHIBIT 7 TO AFFIDAVIT OF A. V. AGCAOILI: TOLENTINO, 4 *COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES* 346 (1985)

Temporary obstacles to the performance of the prestation, which may be expected to disappear in the near future, do not extinguish the obligation, but merely delay its fulfillment, unless by its nature or by the will of the parties it has to be performed at a determinate time. But if the obstacles are of an unknown and unforeseen duration, the obligation may be considered juridically impossible of performance; it is extinguished, and is not revived by the fact that it becomes possible later when circumstances change. (Tolentino, 346, Vol. IV, Commentaries & Jurisprudence on the Civil Code of the Philippines, 1985 Ed.)

OPINION LETTER OF RICARDO J. ROMULO, DATED NOVEMBER 10, 1987

ROMULO, MABANTA, BUENAVENTURA
SAYOC & DE LOS ANGELES
Attorneys at Law
Fourth Floor, King's Court
2129 Pasong Tamo Street
Makati, Metro Manila

November 10, 1987

John E. Hoffman, Jr., Esq.
Shearman & Sterling
153 East 53rd Street
New York, New York 10022

Re: *Wells Fargo Asia Limited vs. Citibank, N.A.*

Dear Mr. Hoffman:

You have asked for our opinion on Philippine law in connection with the decision of Judge Whitman Knapp in *Wells Fargo Asia Limited vs. Citibank, N.A.*, No. 84 Civ. 996 (S.D.N.Y. May 28, 1987). As more fully explained below, Philippine law has extended the maturity of Citibank's obligation to repay the deposits in this case, or otherwise excused Citibank's performance. Thus, the deposits are not yet payable; there is no breach for which Citibank may be held liable under Philippine law; and Judge Knapp's decision regarding Philippine law is wrong. This conclusion is confirmed in the attached opinion of the Senior Deputy Governor and General Counsel of the Central Bank of the Philippines.

We are familiar with the deposits made by Wells Fargo Asia Limited ("WFAL") with Citibank's branch in Manila ("Citibank Manila"); the confirmations of deposits exchanged by the parties; and the two Philippine law affidavits filed during the trial in this case. We have also reviewed Judge Knapp's decision. I and other

attorneys working under my supervision have thoroughly researched the issues related to the liability of Citibank Manila under Philippine law for the unpaid portion of the deposits.

In addition, in order to provide a complete and authoritative analysis on the effect of Philippine law on Citibank's obligations, we requested the opinion of the Senior Deputy Governor and General Counsel of the Central Bank of the Philippines (the "Central Bank") on specific questions of Philippine law, attached as Exhibit A. The Senior Deputy Governor's response is attached as Exhibit B (the "Central Bank Opinion"). The General Counsel of the Central Bank is the Chief Legal Adviser to the Central Bank,[1] and is therefore authorized to render opinions and to interpret the Philippine banking laws.[2]

I was admitted on March 21, 1960 as a member of the Philippine Bar and since that time have been continuously in the practice of law in the Philipinnes. My educational background is as follows: Bachelor of Social Science, *cum laude*, Georgetown University, 1955; and Doctor of Laws (J.D.), Harvard Law School 1958. From June 1958 to March 1959, I took special courses at the

[1] *Central Bank of the Philippines: January 3, 1949-January 3, 1974*, published by the Central Bank of the Philippines on the occasion of its 25th anniversary on January 3, 1974, p. 211.

[2] It is a well-settled doctrine that "[c]ourts will and should respect the contemporaneous construction placed upon a statute by the executive officers whose duty it is to enforce it, and unless such interpretation is clearly erroneous will ordinarily be controlled thereby." *Philippines Association of Free Labor Unions vs. Bureau of Labor Relations*, 72 SCRA 396, 402 (1976), *quoting Molina vs. Rafferty*, 37 Phil 545 (1918). As the Supreme Court has emphasized, "the construction placed by [the office charged with implementing and enforcing the provisions of a Code] should be given controlling weight." *Philippine Association*, 72 SCRA at 402, *quoting Asturias Sugar Central, Inc. vs. Commissioner of Customs*, 29 SCRA 617, 623 (1969).

Ateneo de Manila Law School in preparation for the Philippine Bar Examinations. I am the senior partner of the law firm Romulo, Mabanta, Buenaventura, Sayoc & de Los Angeles. My firm is engaged in the general practice of law, but I specialize in banking, corporation, foreign investments and commercial laws. In the Philippines, my firm and I represent Citibank, N.A., Mellon Bank, N.A., and the National Commercial Bank of Saudi Arabia. Aside from these clients, we represent multinational companies like IBM, Ford, Union Oil of California and Coca-Cola.

On several occasions, I have served as special lecturer at the University of the Philippines Law Center (1967, 1973, 1975, 1977) and its College of Law (1973-1974). I was appointed by the Philippine Supreme Court as Bar Examiner in Taxation (1974), and to the Supreme Court's Judicial Code Committee (1973-1978). In June of 1986, President Corazon C. Aquino appointed me a member of the Constitutional Commission where I also served as Vice-Chairman of the Judiciary Committee. I have been a director of Equitable Banking Corporation since 1975 and have been its Vice-Chairman since 1982.

The Applicability of Philippine Law

Philippine law defines the terms and conditions under which Citibank must perform its obligations under the deposit contracts in this case. Philippine choice of law rules show that Philippine substantive law applies to operations of Citibank Manila. [*See* V. Francisco, *Private International Law* 104 (1954)]

Citibank Manila is subject to Philippine law. Branches of foreign banks licensed by the Central Bank to conduct a full-service banking business in the Philippines, such as Citibank Manila, are considered to be banking institutions under Philippine law. Thus, Section 18 of the General Banking Act expressly provides that a foreign bank's operations in the Philippines are subject to Philip-

pine law, including the rules and regulations issued by the Central Bank:

> "In all matters not specifically covered by special provisions applicable only to foreign banks, or their branches and agencies in the Philippines, any foreign banking corporation or foreign bank not formed, organized, or existing under the laws of the Philippines but lawfully doing business in the Philippines shall be bound by all laws, rules, and regulations applicable to domestic banking corporations of the same class . . . ." [Section 18, General Banking Act, R.A. No. 337, as amended.]

Deposits with Citibank Manila are payable in the Philippines and subject to Philippine law. Courts and commentators agree that, unless there is an express agreement otherwise, deposits placed with a Philippine bank, including deposits with Philippine branches of foreign banks, are payable at that bank or bank branch in the Philippines. [V. Francisco, *supra, at* 104, 115; *see also Dunn vs. Bank of Nova Scotia*, 374 F.2d 876 (5th Cir. 1967); *Bluebird Undergarment Corp. vs. Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (N.Y. City Ct. 1931); *Central Hanover Bank & Trust Co. vs. Seimens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S.D.N.Y. 1945)] Thus, the situs of a bank deposit is where the debt is placed and to be paid, which in this case is the Philippine branch of the foreign bank. [*See* J. Aruego, *Handbook on Private International Law* 157 (1971)]. As the commentators have explained,

> "A deposit of money, whether as a sum or *in specie*, is naturally bound to the place of the banking or financing institution to which it is entrusted. Logically, the law of that place governs the deposit." [*See* J. Salonga and P. Yap, *Private International Law* 295 (1978).]

Philippine banking law explicitly distinguishes obligations payable at an office of a bank located outside of the

Philippines from obligations payable at a bank within the Philippines. Thus:

> "any obligation of a bank which is payable at the office of the bank located outside of the Philippines shall not be a deposit for any of the purposes of this Act. . . ." [Philippine Deposit Insurance Corporation Act, R.A. No. 3591, as amended, Section 3(f)]

Accordingly, deposit insurance assessments are required on deposits payable within the Philippines, but not on those payable outside the Philippines. The Philippine Deposit Insurance Corporation Act is modeled on the United States Federal Deposit Insurance Act which requires insurance assessments on deposits payable in the United States, but not on those payable outside the United States. [M. Gamboa, *An Introduction to Philippine Law* 78 (7th ed.) 1969; *see also* Section 9 of the Foreign Currency Deposit Act and Section 105 of Republic Act No. 265 on the computation of reserves for legally mandated reserve requirements on deposit obligations of the Philippine offices of Philippine banks, including Philippine branches of foreign banks.] [3]

The deposits in this case were placed with Citibank's Manila branch, were to be performed at Citibank Manila, and are payable at Citibank Manila. The Central Bank confirmed that:

[3] In the Philippine legal system, it is a cardinal rule of statutory construction to refer to foreign jurisprudence where the Philippine legislature borrowed or adopted certain rules from foreign sources. [*See* M. Gamboa, *supra* at 69-78; *Alzua vs. Johnson*, 21 Phil 308 (January 31, 1912), 42 Phil 980 (November 10, 1913)] Accordingly, the proper interpretation of these laws generally follows the trend in the country of origin. The Supreme Court has explained:

> "[i]t is a familiar rule of statutory construction that the judicial construction attached to the sources of statutes adopted in a jurisdiction are of authoritative value in the interpretation of local laws." [*Wise & Co. vs. Meer*, 78 Phil 655, 670 (June 30, 1947)]

> "[u]nless the deposit contract otherwise specifies, deposits placed with the Manila branch of Citibank are payable at that branch." [Item I, Central Bank Opinion]

Thus, Philippine law is an integral part of the deposit contract. [*See, e.g.*, J. Aruego, *Handbook on Private International Law* 156 (1971); *Skandia America Reinsurance Corp. vs. Schenck*, 441 F. Supp. 715 (S.D.N.Y. 1977).] Deposit contracts are subject not only to the Philippine law in existence at the time of the placing of the deposit, but also to subsequent changes in the law. As the Philippine Supreme Court has explained,

> "[A]ll contracts are subject to the police power of the State. Being an inherent attribute of sovereignty, such power is deemed incorporated into the laws of the land which are part of all contracts, thereby qualifying the obligations arising therefrom." [*Central Bank of the Philippines vs. Cloribel*, 44 SCRA 307 (April 11, 1972). *See also Rutter vs. Esteban*, 93 Phil. 68, 75 (May 18, 1953), which justifies the rule "on the theory that all contracts are made subject to an implied reservation of the protective power of the state," citing 47 Harv. L. Rev. 660; *Santovenia vs. Confederation Life Association*, 460 F.2d 805 (5th Cir 1972)]

Where the Philippine Law applicable to a contract is changed, the contract is subject to that change in law.

The Philippine Emergency Decrees and Their Effect on Citibank's Obligations

In the fall of 1983, the Philippine Government experienced a financial and economic crisis, including a severe shortage of foreign currency. To protect dwindling foreign currency reserves and to allocate the limited foreign exchange available to essentials such as food and medicine, the Philippine Government took several emergency measures.

On October 15, 1983, the Prime Minister and Minister of Finance of the Philippines and the Governor of the Central Bank of the Philippines issued a telex to the international banking community (the "Standstill Telex"), explaining that a severe "international recession" had affected the Philippines, causing a "severe and rapid loss of international reserves." They further explained that the Philippines lacked sufficient foreign currency reserves to meet its foreign debt obligations. As a consequence, the telex requested a roll-over for 90 days of all specified external indebtedness owed by Philippine public and private sector obligors.

As to the deposit obligations in this case, the Government officials requested that all foreign bank creditors of the Philippines extend the maturities of private sector obligations owed to foreign financial institutions:

> "All forms of external debt owed to foreign financial institutions (including but not limited to debt documented as . . . deposits . . .) falling due in the 90-day period will be extended for 90 days. . . ."

The Standstill Telex expressly applied to Philippine branches of foreign banks: "Philippine branches of foreign banks will be considered private financial sector institutions."

That same day, to complement the Standstill Telex and to insure no further drain on the foreign currency reserves of the Philippines, the Central Bank issued Memorandum to Authorized Agent Banks No. 47 ("MAAB 47"). Under MAAB 47, repayment of certain foreign currency obligations without prior Central Bank approval was expressly prohibited:

> "Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or foreign financial institutions, irrespective of maturity, shall be submitted to the Central Bank . . . for prior approval."

Any reduction in total obligations to foreign banks and/or foreign financial institutions was prohibited without Central Bank approval:

> "Accordingly, total obligations to foreign banks/financial institutions . . . shall not be reduced without prior Central Bank approval."

MAAB 47 was to be followed strictly, and sanctions were to be imposed for any deviations:

> "Appropriate sanctions shall be imposed on banks which fail to strictly comply with this directive."

Over the next several weeks, the Central Bank implemented additional measures to manage scarce foreign exchange reserves. On November 4, 1983, the Central Bank issued Circular No. 970 directing that all banks surrender their foreign exchange to the Central Bank:

> "All banks shall sell to the Central Bank all foreign exchange receipts from merchandise exports, services, transfers, over-the-counter transactions, and other similar receipts as soon as those are received by the Bank."

Specific priorities were established under which the foreign exchange could be used:

> "The amount generated shall be constituted into a pool for the purpose of meeting payments in accordance with a priority system that shall provide for (1) oil imports, (2) official development assistance loans, (3) related payments for (a) inputs to export products, (b) raw materials for vital domestic industries and (c) food grains, (4) interest on bank loans, (5) interbank loans and trade related credits." [Id.][4]

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[4] The Central Bank has provided in both its regulations and the Standstill Telex that interbank loan transactions are distinct from deposits. *See* I Central Bank Manual of Regulations for Banks and Other Financial Intermediaries, as amended by Central Bank Cir-

The list of priorities did not include the principal of obligations owed to foreign banks such as the deposit liabilities in this case.

The Central Bank expressly required complete cooperation of all banks:

> "The total cooperation of all banks and bank officers is expected as the responses of the financial system to the urgent needs of the country." [Id.]

Four days later, on November 8, 1983, the Central Bank issued Operating Guidelines No. 1 to Circular No. 970, underscoring the restriction on the use of foreign exchange and further limiting the priorities for which the foreign exchange could be used: "all imports, raw materials and spare parts for export products, grain imports and raw materials for vital domestic industries, such as medical supplies." The Central Bank Operating Guidelines further provided that "[a]ny and all exceptions shall require the prior approval of the Central Bank on recommendation of the [Joint Committee]."

Thus, from the outset of the economic crisis, the Philippine Government—*by Philippine law*—extended the maturities of foreign currency debt, including the deposits in this case and allocated scarce foreign exchange for priority uses.

Prior Precedent Regarding Debt Suspension

It is well established in Philippine jurisprudence that governmental decrees can extend the maturity dates of contract obligations. Debts have been postponed in times of emergency and in response to an economic crisis.

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cular No. 929 (May 23, 1983) (term "interbank loan transactions" means bank loans such as call loans, borrowings evidenced by deposit substitutes and purchases of receivables with recourse); Standstill Telex Paragraph 11.B (external debt includes "loans, advances, deposits, Peso currency swaps or guarantees").

A. *Postponement due to Emergency Measures*

Moratoria have been used by governments to deal with emergency financial distress. As the Philippine Supreme Court has explained:

> "For some 1,400 years western civilization has made use of extraordinary devices for saving the credit structure, devices generally known as moratoria. The moratorium is a postponement of fulfillment of obligations decreed by the state through the medium of the courts or the legislature." [*Rutter vs. Esteban*, 93 Phil 68, 72 (May 18, 1953)]

The Philippine Executive Orders issued in 1944 and 1945 to suspend debt repayment are illustrative. During and after World War II, the President of the Philippines issued two Executive Orders, freezing all bank deposits and temporarily suspending payment of other debt and monetary obligations. [*See* Executive Order No. 25, 41 Official Gazette, No. 1, p. 50 (Nov. 18, 1944), amended by Executive Order No., 32, 41 Official Gazette, No. 1, p. 56 (March 10, 1945) ("[e]nforcement of payment of all debts and other monetary obligations payable within the Philippines . . . is temporarily suspended . . .")] The Philippine legislature confirmed these Executive Orders in Republic Act No. 342 (July 26, 1948):

> "All debts and other monetary obligations payable by private parties within the Philippines originally incurred or contracted before December 8, 1941, and still remaining unpaid . . . shall not be due and demandable for a period of eight (8) years from and after settlement of the war damage claim of the debtor by the United States Philippine War Damage Commission . . . ."

Thus, consistent with Philippine law, the maturities of all monetary obligations, including bank deposits, were extended, so they were not due and payable on their contractually stated dates.

The purpose of these suspension orders was to address the economic emergency engendered by the devastations of war. Their effect was to provide debtors with time in which to recover from severe economic disorder.

The suspension orders were repeatedly upheld by the Philippine Supreme Court as a valid exercise of power. Many courts upheld the suspension orders in dismissing actions brought to enforce the debts. [*See, e.g.*, *Tarnate vs. Daza*, No. L-323, 43 Official Gazette, No. 3, p. 853 (July 31, 1946); *Ma-ao Sugar Central Co. vs. Barrios*, 79 Phil 666 (December 3, 1947); *Community Investment and Finance Corp. vs. Garcia*, 88 Phil 215 (February 27, 1951); *Uy v. Katigbak*, G. R. No. L-1830, (December 31, 1949) quoted in 14 Velayo's Digest 479 (1947-54)] Other courts have permitted the entry of judgments on the indebtedness, but refused to enforce the payment of that indebtedness. [*See, e.g., Garrido vs. North Camarines Lumber Co.*, 44 Official Gazette 4400, 4408 (Oct. 24, 1947). *See also Palacios vs. Daza*, 42 Official Gazette 53 (Oct. 16, 1945)] Only in 1953, after eight years of implementing the deferral, and consistent with the statutory eight year period granted by the legislature, the Supreme Court held that the Philippine economy had sufficiently recovered so that the need for the debt postponement had lapsed. Then and only then the suspension of enforceability was denied effect. [*Rutter vs. Esteban*, 93 Phil 68 (May 18, 1953)] The Philippine courts since Rutter have continued to uphold the suspension order for the eight-year period, sustaining suspension of prescription periods for claims arising out of these debts. [*E.g., Republic of the Philippines v. Julio Herida*, 119 SCRA 411 (December 27, 1982); *Gaston vs. Republic*, 19 SCRA 685 (March 30, 1967); *Republic of the Philippines vs. Rodriguez*, 63 Official Gazette No. 8, 1741 (January 31, 1966); *Rio y Cia vs. Sandoval*, 100 Phil 407 (November 28, 1950); *de Agbayani vs. Philippine National Bank*, 38 SCRA 429 (April 29, 1971)]

In this case, MAAB 47 and other Central Bank emergency measures were also issued to address a serious

economic emergency. Although this time the crisis involved foreign rather than domestic currency obligations, the effect was the same: the maturities of the obligations were extended for a reasonable period of time in the context of rescheduling of Philippine private and public sector debt. We specifically asked the Central Bank how MAAB 47 affected the obligation under Philippine law of Citibank's Manila branch to repay foreign currency deposits. The Central Bank confirmed:

> "Both MAAB 47 and the Standstill Telex suspended temporarily the payment of foreign currency obligations due to foreign banks and financial institutions, except to the extent the Central Bank authorized repayment." [Item 2, Central Bank Opinion]

Thus, the maturities of the WFAL deposits have been extended and Citibank's obligation to repay WFAL is not yet due.[5]

B. *Postponement Due to Other Circumstances*

Under the Philippine Civil Code and other Philippine jurisprudence, repayment of the deposits was also postponed. [*See* Affidavit of Antonio Agcaoili submitted to the New York court.] It is well established under Philipine law that unforeseeable or inevitable events will defer a party's obligation to fulfill a contract. Thus, in *Asia Bed Factory vs. National Bed Workers' Union*, 100 Phil 838 (January 31, 1957), an employer was relieved of his obligation to pay wages to employees who worked on Sundays because Philippine law forced the employer to suspend business on Sundays. The Court stated that, "it would seem the height of injustice to deprive the em-

[5] Although Citibank's obligation is deferred, the deferral, as with the post-war suspension order, does not prohibit Citibank from paying voluntarily. [*Cruz vs. Kelly and Marcelo*, 92 Phil 1054 (1953)] However, the ability to pay voluntarily must be distinguished from a requirement to pay.

ployer of his right [to provide work on Sundays] without, at the same time, relieving him of the obligation to pay the employees," [*Id.* at 840.] Indeed, contracts must be construed to temporarily relieve a party from such inevitable circumstances, unless the parties contract otherwise. [Tolentino, *Commentaries and Jurisprudence on the Civil Code of the Philippines*, Vol. IV, p. 130. (1985)] Thus, in *Lizares vs. Hernaez*, 40 Phil 981 (March 30, 1920), where an express obligation to surrender premises in good condition did not include the obligation to rebuild in the event of destruction by a fortuitous cause, no obligation to rebuild would be implied.

In addition, Article 1174 of the Civil Code provides:

> "Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen, or which, though foreseen, were inevitable."

Postponement of the fulfillment of obligations is shown so long as the following four elements are met:

> (a) the cause of breach of the obligation is independent of the will of the debtor;
>
> (b) the event is either unforeseeable or unavoidable;
>
> (c) the event is such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and
>
> (d) the debtor is free from any participation in, or aggravation of, the injury to the creditor. [*Lasam vs. Smith*, 45 Phil 657 (February 2, 1924)]

For example, in *Philippine National Bank vs. Court of Appeals*, 94 SCRA 356 (November 21, 1979), the Court excused the defendants' failure to fulfill their payment obligations due to war and other unforeseen events:

> [T]he record shows that the Solomon spouses religiously paid their annual installments and it was only due to the outbreak of the war and their untimely deaths in 1941 and 1943 respectively, that they failed to make payments of the last two amortizations which became due in December 1941 and December 1942. The non-fulfillment of the obligation was not of their own making, and they can be exempted from responsibility therefor under Article 1174 of the Civil Code. War, or its effects, or other factors which could not have been foreseen or avoided by a party to a contract, such as uncertain conditions of peace and order then prevailing which the Court may take judicial notice of, are deemed sufficient causes that could justify the non-fulfillment of a contract and exempt a party from responsibility." [*Id.* at 370-371]

Thus, where the inevitable event renders it impossible for a debtor to perform in the *normal manner*, such performance is temporarily deferred.

In this case, MAAB 47 temporarily deferred the fulfillment of the deposit obligations. From the point of view of individual private sector debtors, the Philippine debt crisis was unavoidable. There was no express provision denying Citibank's right to claim temporary postponement of the obligations. Nor was there any obligation on Citibank to repay the deposits in other than the normal manner, which was to repay the deposits without transferring funds from its non-Philippine offices to Citibank Manila. Thus, Citibank Manila's payment on the deposits was temporarily postponed by Philippine law.

No Affirmative Obligation Under Philippine Law Exists to Create an Obligation to Repay These Deposits

Judge Knapp has ruled that Philippine law does not provide a defense to Citibank on the WFAL deposits. Indeed, he went further to rule that Philippine law does

not prohibit Citibank from transferring funds from its non-Philippine branches to the Philippines to repay the WFAL deposits. Thus, he concluded that Philippine law imposes an obligation on Citibank to transfer assets to the Philippines to repay these deposits. This is incorrect. Philippine law imposes no affirmative obligation on Citibank to repay the deposits in this case at this time.

Consistent with established principles of Philippine law, emergency regulations have suspended or otherwise deferred Citibank's obligation to repay the deposits. At least at this time, there has been no breach of contract on which to hold Citibank liable under Philippine law.

In the absence of a breach, and contrary to the view of the New York Judge, Philippine law does not create an obligation to transfer assets into the Philippines from another country. There is simply no legal basis for this proposition under Philippine law. [*Cf. Times, Inc. vs. Reyes*, 39 SCRA 303 (May 31, 1971)] Under Article 10 of the Civil Code, "[i]n case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail." MAAB 47 would not be interpreted by a Philippine court so as to violate fundamental principles of sovereignty and justice.

The New York Judge has extended Philippine law far beyond its intended reach to require—*as a matter of Philippine law*—that regardless of postponement of contract obligations, Citibank move its assets around the world into the Philippines. Under those circumstances, Philippine law does not pretend to reach the global assets of Citibank. Thus, in *Times, Inc. vs. Reyes*, 39 SCRA 303 (May 31, 1971), the Philippine Supreme Court noted the limited reach of a Philippine court in enforcing an order of attachment of property outside the Philippines. We asked the Central Bank whether, when a deposit obligation has been suspended under Philippine law, Philippine law imposed any obligation on the foreign bank to transfer funds of its non-Philippine branches to the

Philippines or to pay that deposit at branches outside the Philippines. The Central Bank replied:

> "Under such circumstances, there is no obligation imposed under Philippine law on a foreign bank to remit funds to its Philippine branch to pay deposits whose payment has otherwise been temporarily suspended as aforesaid stated. Nor is there an obligation imposed under Philippine law that the foreign bank pay the Philippine branch deposits in those circumstances at branches outside the Philippines." [Item 2, Central Bank Opinion]

To apply Philippine law to assets around the world would be to violate fundamental international law principles regarding sovereignty and jurisdiction.

The telex from the Governor of the Central Bank dated December 14, 1984 to Wells Fargo Latin American Bank, Cayman Islands (Pl. Ex. 59) is not to the contrary. The Central Bank has explained its prior telex as it may relate to this litigation. The Central Bank explained that Wells Fargo asked the very precise question of whether the issuance of a judgment or the payment of a settlement on specific facts would be consistent with the Restructuring Principles. The Restructuring Principles were announced in November of 1984 by the Philippine Prime Minister and Minister of Finance, the Governor of the Central Bank and the bank creditors' Advisory Committee and were to be implemented by restructuring agreements and further regulations of the Central Bank. Under these Restructuring Principles, which applied to debt owed by both Philippine governmental and private entities, payment of foreign currency debt was to be restructured and the maturity dates would be extended or otherwise rescheduled.

In its December 14 telex, the Central Bank assumed the following:

"By stating that any such judgment or settlement was recoverable from the non-Philippine office of a foreign bank, we assumed that either a court declared as a matter of law that payment was required by the non-Philippine office of a foreign bank or that the parties agreed by way of settlement to payment by a non-Philippine office. On those assumed facts, there was no inconsistency with the Restructuring Principles because such payment would not result directly or indirectly in a net outflow of foreign currency from the Philippines." [Item 3, Central Bank Opinion]

Based on those assumed facts, there was no inconsistency with the Restructuring Principles for Citibank to pay these deposits with its assets of its non-Philippine branches outside the Philippines. But the Central Bank confirmed:

"We did not state or imply that, where the maturities of the obligations have been affected by MAAB 47 and the Standstill Telex, the law of the Philippines imposed an obligation on Citibank to transfer funds from its non-Philippine branches to its Manila branch or to otherwise pay the debt outside the Philippines." [Item 3, Central Bank Opinion]

Nor does *National City Bank of New York vs. Posadas*, 60 Phil 630 (September 21, 1934), cited by Mr. Castillo in his affidavit to the New York Court, impose an obligation on Citibank to repay these deposits at this time. While Citibank is a single entity which may be held liable for breach of contract by its Philippine branch, no breach has occurred which is properly subject to enforcement and no valid claim against Citibank exists under Philippine law.

Conclusion

The New York court's decision misinterprets Philippine law. The deposits were payable in Manila, subject to

Philippine law. The maturities of the deposits have been extended and the obligation to repay the deposits has been deferred under Philippine law. In our view, the New York Judge's conclusions regarding Philippine law are erroneous and should be reversed by the New York appellate court.

Sincerely,

ROMULO, MABANTA,
BUENAVENTURA SAYOC, &
DE LOS ANGELES

By: /s/ Ricardo J. Romulo
RICARDO J. ROMULO

Encl: a.s.

RJR: AMS:clb

**EXHIBIT 1 TO ROMULO'S LETTER:
LETTER FROM ROMULO TO SINGSON,
DATED AUGUST 13, 1987 WITH ATTACHED TELEX**

ROMULO, MABANTA, BUENAVENTURA
SAYOC & DE LOS ANGELES
Attorneys at Law
Fourth Floor, King's Court
2129 Pasong Tamo Street
Makati, Metro Manila

13 August 1987

Senior Deputy Governor and
General Counsel Gabriel C. Singson
Central Bank of the Philippines
Central Bank Building
H. B. Harrison
Manila

Dear Governor Singson:

As counsel to, and on behalf of the Manila branch of Citibank, N.A., we request your legal opinion on the questions set forth below:

1. Is the Manila branch of Citibank, N.A. subject to the regulations of the Central Bank, including MAAB 47?

2. How does MAAB 47 affect the obligation under Philippine law of Citibank's Manila branch to repay foreign currency deposits? Where the payment of a foreign bank's Philippine branch deposit obligation has been suspended under Philippine law, does Philippine law impose any obligation on that foreign bank to transfer funds of its non-Philippine branches to the Philippines to pay that deposit? Or in those circumstances is any obligation imposed on the foreign bank under Philippine law to pay that deposit at branches outside the Philippines?

3. Does the Central Bank's telex of December 14, 1984 (attached as Exhibit A) state or imply that, where

the payment of a foreign bank's Philippine branch deposit obligation has been suspended under Philippine law, Citibank has an obligation under Philippine law to transfer funds of its non-Philippine branches to its Manila branch or otherwise to pay the deposits outside the Philippines?

Your attention to this matter is greatly appreciated.

Sincerely,

/s/ Ricardo J. Romulo
RICARDO J. ROMULO

RJR:gma

Encl: a/s

DECEMBER 28, 1984

TO: BROBECK, PHLEGER & HARRISON
SAN FRANCISCO

ATTN: DUNCAN HAYNES

PURSUANT TO OUR CONVERSATION OF TODAY, BELOW IS THE TELEX DISCUSSED:

QUOTE

DECEMBER 14, 1984

TO: WELLS FARGO LATIN AMERICAN BANK,
CAYMAN ISLANDS

CC: DUNCAN HAYNES, ESQ.
BROBECK, PHLEGER & HARRISON

FROM: JOSE B. FERNANDEZ, JR.
GOVERNOR, CENTRAL BANK OF THE PHILIPPINES

RE: OFF-SHORE RECOVERY OF FCDU DEPOSITS

WE REFER TO THE RECENT DISCUSSIONS BETWEEN SPECIAL NEW YORK COUNSEL MESSRS. CLEARY, GOTTLIEB, STEEN AND HAMILTON, AND OUTSIDE COUNSEL FOR WELLS FARGO BANK REGARDING OFF-SHORE RECOVERY OF FCDU DEPOSITS. THIS COMMUNICATION WILL INFORM YOU THAT IF THERE IS A JUDGMENT BY A COURT OR AN EXTRAJUDICIAL SETTLEMENT TO THE EFFECT THAT A FOREIGN DEPOSIT PLACED WITH A FOREIGN CURRENCY DEPOSIT UNIT ("FCDU") OF THE PHILIPPINE BRANCH OF A FOREIGN

BANK IS RECOVERABLE FROM A NON PHILIPPINE OFFICE OF SUCH FOREIGN BANK AND IF SUCH LIABILITY IS SATISFIED FROM ASSETS HELD OUTSIDE THE PHILIPPINES AND DOES NOT RESULT DIRECTLY OR INDIRECTLY, IN A NET OUTFLOW OF FOREIGN CURRENCY FROM THE PHILIPPINES THE CENTRAL BANK OF THE PHILIPPINES IS OF THE VIEW THAT THE SATISFACTION OF PAYMENT OF SUCH DEPOSIT LIABILITY IN THESE TERMS WOULD NOT BE INCONSISTENT WITH THE RESTRUCTURING PRINCIPLES SET OUT IN THE NOVEMBER 2, 1984 COMMUNICATION ADDRESSED TO THE INTERNATIONAL BANKING COMMUNITY.
REGARDS,

JOSE B. FERNANDEZ, JR.
GOVERNOR
CENTRAL BANK OF THE PHILIPPINES
MANILA

UNQUOTE

IF YOU HAVE ANY QUESTIONS, PLEASE DO NOT HESITATE TO CONTACT ME.

BILL BEE
WELLS FARGO INTERNATIONAL LIMITED
GRAND CAYMAN

4410 WELLSCI CP
BPM LW

VIA WUI 8
THEY DISC

EXHIBIT 2 TO ROMULO'S LETTER: LETTER FROM SINGSON TO ROMULO, DATED AUGUST 13, 1987

CENTRAL BANK OF THE PHILIPPINES
MANILA

Office of the Senior Deputy Governor

August 13, 1987

Atty. Ricardo J. Romulo
Romulo, Mabanta, Buenaventura
Sayoc & De Los Angeles
Attorneys At Law
Fourth Floor, King's Court
2129 Pasong Tamo Street
Makati, Metro Manila

Dear Atty. Romulo:

I am responding to your letter of August 13, 1987, requesting my opinion regarding the obligations of Citibank, N.A. and its Manila branch under Philippine law. The numbered paragraphs correspond to the numbered questions in your letter.

1. The Manila branch of Citibank is considered under Philippine law to be a Philippine bank, and is licensed by the Central Bank to conduct a banking business in the Philippines. Unless the deposit contract otherwise specifies, deposits placed with the Manila branch of Citibank are payable at that branch. The branch, and its obligations, are subject to regulations of the Central Bank, including MAAB 47.

2. MAAB 47 was issued to complement the Standstill Telex of October 15, 1983, from the Philippine Minister of Finance and Governor of the Central Bank. Both MAAB 47 and the Standstill Telex suspended temporarily

the payment of foreign currency obligations due to foreign banks and financial institutions, except to the extent the Central Bank authorized repayment. Under such circumstances, there is no obligation imposed under Philippine law on a foreign bank to remit funds to its Philippine branch to pay deposits whose payment has otherwise been temporarily suspended as aforesaid stated. Nor is there an obligation imposed under Philippine law that the foreign bank pay the Philippine branch deposits in those circumstances at branches outside the Philippines.

3. We were asked whether the issuance of a judgment or the payment of a settlement on certain facts would be consistent with the Restructuring Principles. We responded,

> "If there is a judgment by a court or an extrajudicial settlement to the effect that a foreign currency deposit placed with a foreign currency deposit unit ("FCDU") of the Philippine branch of a foreign bank is recoverable from a non-Philippine office of such foreign bank and if such liability is satisfied from assets held outside the Philippines and does not result, directly or indirectly, in a net outflow of foreign currency from the Philippines the Central Bank of the Philippines is of the view that the satisfaction of payment of such deposit liability on these terms would not be inconsistent with the Restructuring Principles set out in the November 2, 1984 communication addressed to the international banking community."

By stating that any such judgment or settlement was recoverable from the non-Philippine office of a foreign bank, we assumed that either a court declared as a matter of law that payment was required by the non-Philippine office of a foreign bank or that the parties agreed by way of settlement to payment by a non-

Philippine office. On those assumed facts, there was no inconsistency with the Restructuring Principles because such payment would not result directly or indirectly in a net outflow of foreign currency from the Philippines.

We did not state or imply that, where the maturities of the obligations have been affected by MAAB 47 and the Standstill Telex, the law of the Philippines imposed an obligation on Citibank to transfer funds from its non-Philippine branches to its Manila branch or to otherwise pay the debt outside the Philippines.

Sincerely,

/s/ Gabriel C. Singson
GABRIEL C. SINGSON
Senior Deputy Governor
and General Counsel

TRANSCRIPT OF TRIAL PROCEEDINGS, DECEMBER 15 THROUGH DECEMBER 19, 1986 (EXCERPTS)

TESTIMONY OF FARNUM W. COLE

* * * *

[90] Q. And Mr. Tan brought that to your attention?
A. That's correct.
Q. At that time, did you have any understanding as to whether or not Citibank was making any request of WFAL?
A. Yes.

At that time, either in the same transmission or in a subsequent, immediately subsequent transmission, because as I recall there were numerous, we were offered what I regarded as a financial inducement, absolutely atypical of the market. They offered to pay us one and one-eighth percentage points above the then-prevailing inter-bank rate for deposits of the maturity spectrum that they were asking us to rollover.

* * * *

[95] Q. Do you see there a reference to a separate leaf attachment?
A. I do.
THE COURT: This is Exhibit 4?
MR. McAMIS: Yes, your Honor.
THE WITNESS: Yes.
MR. McAMIS: It is both on 4 and 5, your Honor, in the lower left-hand corner.
THE WITNESS: It is the fine print in the lower left-hand corner.
THE COURT: "The foregoing shall be . . ."?
THE WITNESS: That's it.
THE COURT: All right.

BY MR. McAMIS:

Q. Now, Mr. Cole, did you find a separate leaf attachment in your file at WFAL?

A. We did not.

Q. Indeed, when Mr. Tan came to you and you had this conversation that you've related, what did you ask for?

A. I asked my operations manager to supply me with all the relevant document in the files pertaining to the two deposits at issue.

* * * *

[104] DIRECT EXAMINATION (Continued)

BY MR. McAMIS:

Q. Mr. Cole, I notice some of these telexes from you and to you are signed and addressed to Clay Cole.

Is Clay a nickname of yours?

A. It is.

Q. I had shown you the confirmation slips. My question now, apart from these documents, do you have an understanding as to the entity with which WFAL made the two deposit placements that are at issue in this case?

A. Yes, I do. That entity was Citibank, N.A.

Q. Is it possible that it was with the Manila branch of Citibank, N.A., in your view?

A. No, it is not possible.

Q. The branch, that is, the word "Manila" does appear in those confirmations, does it not?

A. Yes, it does.

Q. What is your understanding of the significance of that?

A. My understanding that in supplying the address of the branch in Manila, the inclusion of the address in the confirmation supplied us with mechanical information that was required for our bank, in fact, to be able to send to the taking arm of Citibank in Manila our own deposit [105] advices and confirmations and requests as

it was necessary for them on the other hand to direct similar documentation to us.

Furthermore, in the event that there might have been a discrepancy relevant to any of the trade details, the amount, the rate, et cetera, we would have required a contact point in the Citibank, N.A. organization to direct our inquiries to.

Q. Would your answer as to the identity of the taking entity be the same if it were a question of a deposit with any other U.S. money center bank?

If my question is unclear, in the case of a deposit with any money center bank, is the deposit with the entity in your understanding or with the taking branch?

A. It is clearly categorically with the overall entity of that money center bank.

Q. Did there come a time when, to your knowledge, the general counsel of Citibank wrote a letter to Mr. Wager of Wells Fargo respecting the situation that had arisen with regard to these deposits?

A. Yes, it did come to my attention that such a letter was written.

Q. Let me show you this document and ask you if that's the letter.

(Handing to the witness)

* * * *

[114] Q. And from time to time did WFAL extend credit to these various types of organizations or companies in the Philippines?

A. Yes, it did, to various of those types.

Q. And in the case of credits to indegenous borrowers in June 1983 in the Philippines, were they regarded as yellow zone risks?

A. Yes.

Q. In the case of these deposits, these deposit placements with Citibank, N.A. booked at its Manila branch, how were those regarded in terms of country limits?

A. They weren't pertinent to country limits, because the country limits established by our bank's board gov-

erned the aggregate amount of credit that could be extended in our mainstream lending business as I have described it and did not impact the amount of funds that were placed to money center banks in the form of deposit placements.

Q. Taking the case of Citibank, just so I make sure that I understand and that the record is clear, what risk was a deposit placement with Citibank regarded as?

A. It was regarded as a U.S. sovereign risk.

* * * *

[119] Q. Do you know whether or not there has ever been another case in which a major money center bank refused to repay an interbank deposit on the ground that a foreign government prohibited the bank from repaying with assets carried on the books of a branch that booked the deposit and that was located in the country where the prohibition occurred?

A. I never heard of such a thing.

MR. FISCHLER: Your Honor, I rise simply to make it clear for the record that we do not accept that characterization of that having happened in this case.

THE COURT: Okay. Anyway, he never heard of it. Next question.

Q. Do you have any understanding as a banker as to whether or not a depositor in the interbank placement market may look only to particular assets?

A. Absolutely not.

Q. What is your understanding as to the right of a depositor in that respect?

A. My understanding is clear that a depositor with a money center bank may look to all of the assets of that money center's institution with which the deposit is placed [120] regardless of where the assets are held, and most specifically to the head office of that institution.

Q. Taking the particular instance here, do you know whether or not Bank of America did business in the Philippines at the time of the moratorium in 1983?

A. I know that the Bank of America maintained a branch office in Manila at that time.

Q. Do you have any understanding as to whether or not Bank of America had accepted deposit placements in the interbank deposit placement market?

A. Yes, I have such knowledge.

Q. And what is your knowledge?

A. My knowledge is based on a telephone call I placed to an officer at the Bank of America branch in Manila to determine what that bank was doing relevant to meeting its deposit liability obligations in view of the moratorium situation that was described to us by Citibank.

Q. Before I ask you what you found out, when did you make this inquiry?

A. I made that inquiry almost immediately after Citibank informed us that they were going to default on our deposits.

Q. This was in December 1983?

A. That was in December 1983.

* * * *

[127] MR. FISCHLER: Objection, your Honor. It's been asked and answered.

THE COURT: I think he has just told us what it was.

Q. Well, was it the same as you have already indicated with respect to the 100 percent-owned subsidiaries?

A. It was.

Q. Returning to the deposits in this case, Mr. Cole, what is your understanding as to the place these deposits were to be payable on maturity as agreed to by the parties?

A. The terms were very specific in that respect. They were to be payable by Wells Fargo Asia Limited through its correspondent in New York, Wells Fargo Bank International—

Q. Excuse me, I asked at maturity.

A. I beg your pardon.

At maturity, it was equally clearly specified in the confirmation slips. It was to be paid by Citibank, N.A. to Wells Fargo Bank International for the account maintained there by Wells Fargo Asia Limited.

Q. Mr. Cole, I asked where—

A. In New York.

Q. —payment was to take place.

[128] A. In New York. I'm sorry.

Q. And you're clear about that?

A. Yes.

Q. And what is the basis of your understanding in that respect?

A. The basis of my understanding is the facts as presented in the relevant confirmation slips.

Q. Would you say that was the agreement between the parties—

A. The agreement between the parties.

Q. —in this particular case?

A. Yes.

MR. McAMIS: No further questions.

MR. SNIDER: Your Honor, I just wanted to report back on a discussion we had about documents before cross-examination began, because one of the documents pertains to this witness.

Mr. Fischler has confirmed over the lunch hour, your Honor, that with respect to Plaintiff's Exhibits 1 through 12 for identification, 15 to 22, 24—that portion of it with respect to Bates 491 through 498—and Plaintiff's Exhibit 32 for identification, are all covered by the stipulation and they can be received into evidence and there is no problem.

* * * *

[133] MR. FISCHLER: May I proceed, your Honor?

THE COURT: You're standing there, so I take it you're ready to proceed.

MR. FISCHLER: Yes, your Honor, I am.

CROSS EXAMINATION

BY MR. FISCHLER:

Q. Mr. Cole, you would agree with me, would you not, that foreign branches of U.S. banks are subject to the laws and regulations of the country in which the branches operate?

A. The branches are so subject.

Q. You agree; yes?

A. Yes.

Q. And you understood that on June 10 of 1983, didn't you?

A. Yes.

Q. You're familiar with the terms "country risk" and "sovereign risk," aren't you, Mr. Cole?

A. I am.

Q. You had heard of those terms as of June 10, 1983, had you not?

A. I had.

Q. In fact, both Wells Fargo Asia and Wells Fargo Bank used those terms in its business as of June 10, 1983, [134] didn't they?

A. Yes, those terms were used—

THE COURT: The answer is yes or no.

I don't know whether you followed my trial in New Haven, but I'm a stickler for our tribal customs. Our tribal custom is that if a question can be answered yes or no, it should be; and we save an awful lot of time.

Q. Let me try it on that basis one more time, Mr. Cole.

You understood that as of June 10, 1983, both Wells Fargo Asia and Wells Fargo Bank used the terms "sovereign risk" and "country risk" in their business.

Correct?

THE COURT: Yes or no.

THE WITNESS: I would like to qualify my answer.

THE COURT: I don't want you to qualify it.

Did they use it in their business?

THE WITNESS: In a part of their business, yes.

THE COURT: Yes, is the answer.

Q. Mr. Cole, I'm going to show you what's been marked as Defendant's Exhibit A for identification—

THE COURT: The point is, if your counsel believes that question needs to be expanded, he may do so.

We save an awful lot of time by your just answering the question and getting onto the next one.

• • • •

[143] MR. FISCHLER: August of 1983, your Honor.

Q. Back to red zone countries, Mr. Cole.

It is correct, is it not, that on June 10, 1983, WFAL's policy precluded the placement of a dollar deposit with a bank or branch located in a red-zone country? Isn't that a fact, Mr. Cole?

A. That is a fact.

Q. And that was true even if the branch was a branch of a money-center bank; correct?

A. That is correct.

Q. And even if that money-center bank had its home office on Park Avenue in New York City; isn't that correct?

A. That is correct:

THE COURT: What was—go ahead.

MR. FISCHLER: Your Honor has something that you would like to bring up at this time?

THE COURT: No. I withdraw my interruption.

Q. You understood on June 10, 1983, that Citibank was a money-center bank. Isn't that right?

Q. So that on June 10, 1983, if the Philippines had been classified a red-zone country, WFAL's policy would have precluded the placement of the deposits at issue in this case; isn't that right?

A. That's right.

[144] Q. And the fact that Citibank's head office is in midtown Manhattan didn't mean a thing; correct?

A. Relative to the policy, correct?

Q. It wouldn't have changed the policy; correct?

A. Correct.

Q. And not only couldn't you have put a deposit placement into a Citibank branch in the Philippines if it had been red-zoned, you couldn't put it into a Citibank branch in any country that was red-zoned; isn't that a fact?

A. That's the policy—that was the policy.

Q. Do you recall that there were about 267 countries that were red-zone countries in June of 1983?

A. I don't recall the full list of countries that were red-zoned at that time.

Q. But the point is, WFAL could not make a deposit placement with a Citibank branch located in any of those countries, notwithstanding that the home office is in midtown Manhattan; that's correct, isn't it?

A. By policy.

THE COURT: What do you mean by "by policy"?

THE WITNESS: Well, sir, as has been explained, the Wells Fargo Asia Limited, in concert with its parent bank, Wells Fargo Bank, made a policy determination that we would not engage in deposit placements to branches of money-center banks where those branches were located in [145] what we termed red-zone countries.

Now, we didn't think—

THE COURT: What was the purpose of that?

THE WITNESS: I believe it was very germane. The purpose had nothing to do whatsoever with the nature of the legal liability.

THE COURT: What did it have to do with?

THE WITNESS: It had to do with conceivable delays that might develop.

As Mr. Fischler has pointed out, red-zone countries are in fact subject to—

THE COURT: Well, why would there be any delays if all you had to do was to come to New York and get—

THE WITNESS: Well, let me explain it, if I may, your Honor.

THE COURT: Please.

THE WITNESS: That if, for instance, in the Philippines, there were sufficient civil or military disruptions or other acts of violence that could lead to the destruction, loss or theft of records, it might create delays, costly delays for us to reconstruct the facts in order to to carry our claim to Citibank, N.A. in New York.

We have no doubt whatsoever that we would have ultimately prevailed in doing that and ultimately prevailed in getting those records somewhere from within the Citibank [146] system. We ultimately were confident that Citibank would recognize their legal liability to pay in New York.

But as a business matter, your Honor, it is just life is too short. We have to carry on. Why get yourself involved in places where you can get into those sorts of situations? We have other things to do other than to run around and reconstruct records and to debate with Citibank about the numbers.

MR. FISCHLER: Your Honor, on the basis of Mr. Cole's testimony about the red-zone policy that's reflected in Defendant's Exhibit A, I would now offer it into evidence.

MR. McAMIS: I object, your Honor, on the basis that it has not been established that it has anything to do with deposits, deposit placements. And my understanding is in fact that it does not.

THE COURT: It seems to me that he testified that it did. He testified that if they had gotten the red, he wouldn't have been able to make those deposits. What could be clearer?

MR. McAMIS: That's a separate issue, your Honor, from this document.

* * * *

[160] Q. Mr. Cole—

MR. FISCHLER: If your Honor would like to hear him—

THE COURT: You asked him what the basis of his knowledge was. He is entitled to give it.

A. And it is clear and I think it is to the point of unwritten policy at Wells Fargo on these matters.

At a point in time, rightly or wrongly, Wells Fargo considered the Banco do Bresil, which is a government owned bank headquartered and domiciled in Brazil, to be a money center bank. It subsequently was dropped from the money center bank list by our bank.

At that time that bank maintained what I will term as the equivalent of branches or agencies in various cities in the United States of America. They maintain an agency in LA, in San Francisco and in New York and perhaps in other cities.

Under our policy with respect to placing funds with money center banks or their legal taking arms, and these arms were at once one and the same with the Banco do Bresil headquartered in Brazil, we placed such funds with [161] those banks and we treated the relevant risk not as U.S. risks simply because those agencies were domiciled on U.S. soil, but categorically as Brazilian risk because the parent entity in that case was a Brazilian based bank.

And it was that sort of experience over a good many years reinforced in many, many ways that led me to the firm conviction as I stated that deposit placements to any money center bank anywhere, in making such placements we accepted the risk of the relevant parent bank wherever they were headquartered.

Q. Mr. Cole, the fact is, isn't it, that prior to your taking your position with Wells Fargo Asia in 1981, not once in the course of that breadth of experience you just described, not once were you called upon to consider the sovereign risk implications of a deposit placement with a money center branch, isn't that the fact?

A. I regard the Banco do Bresil situation which took place prior to my joining Wells Fargo Asia Limited as an identical circumstance.

It was not a deposit placement per se; it was an advance of funds, and I believe it was an advance in a way

that banks typically trade moneys in the interbank market in the United States. It was what we call a federal funds advance to that entity. The concept was identical.

• • • •

[175] MR. McAMIS: Your Honor, I apologize for the confusion. While we are trying to sort out our documents here, let me ask the witness a question.

Q. Let me ask you, Mr. Cole, as of June 1983, with respect to deposit placements, was there a line for such deposit placements at Citibank?

A. There was a line established for placements with Citibank by us.

Q. And was there one line for Citibank worldwide or was there a line for various Citibank branches?

A. One line for Citibank, N.A. worldwide.

Q. Did WFAL distinguish in terms of its understanding as to home office risk between branches of Citibank wherever they might be located?

A. No. To us it was the same risk, the home office risk.

Q. You indicated that there was a business policy not to deposit in a red zone country, is that right?

A. That's right.

Q. And did that have anything to do with your understanding as to whether or not the home office was ultimately liable?

A. None whatsover.

• • • •

TESTIMONY OF THOMAS H. BOUGHEY

• • • •

[197] Q. And what does that mean insofar as Wells Fargo is concerned?

A. It's the maximum amount of money that we're allowed to place with Citibank.

Q. Worldwide?

A. Worldwide.

Q. Now, if you have more than one trader, is any trader allowed to place the full amount that's available with Citibank?

A. No.

We would then take that global limit and allocate portions of that to our various trading entities.

THE COURT: So the particular trader he's hypothesizing, would have a limit on Citibank?

THE WITNESS: That's right. That would be part of the total global limit.

Q. It would be part of the total global limit; right?

A Yes.

Q. All right.

Now, at what point in the conversation or in the decision-making process does the trader learn the existence or the identity, rather, of the Citibank branch involved?

A. Well, it could occur at the time of the trade. It would generally occur at the time of the trade, where [198] the broker would say, "All right, your counterparty is Citibank, the Manila branch."

Q. And you say it could occur then?

A. Right.

Q. What other situation might occur?

A. Well, the broker could say, "Well, it's Citibank, and I'll get back to you with the detail."

Q. Does the location of the branch enter in at all to the broker—I mean, to the dealer's, or trader's, consideration as to whether or not to make the deposit in the case of a deposit with Citibank?

A. No.

The counterparty is Citibank. And as long as he has room in his lines, he would make the placement.

Q. And you have testified that there was one worldwide line for Citibank, N.A.

Is that correct?

A. That's correct.

Q. Was that line, that is, in 1983, broken down at all with respect to various Citibank branches?

A. No.

Q. So, under Wells Fargo's policies, the entire world-wide credit line could have been taken up by one or more deposit placements with a single Citibank branch; is that correct?

[199] A. Yes.

Q. And under your policy, did it make any difference where that branch was located?

A. No, because the risk is the parent risk.

Q. You say "parent risk." You mean home-office risk?

A. Yes.

Q. And Citibank's home office is where?

A. What I mean by "parent risk," is Citibank, N.A., which is home office in New York and it is a U.S. Corporation.

Q. So your testimony is that your policy in 1983 was that wherever the branch was located, didn't make any difference, you still regarded the risk as being U.S. risk because that's where Citibank's home office was located; is that correct?

A. That's correct.

Q. And so in deciding whether to make this placement, did it make any difference to the trader where the Citibank branch that happened to be involved, was located?

A. No. It was a Citibank risk.

Q. Are you familiar with the deposit confirmations in this case?

A. I've seen them.

* * * *

[207] Q. Tell me, please, in general, how U.S. dollar inter-bank placements carried on the books of offshore branches or banks are paid and repaid?

A. They are paid through an American bank, generally in New York.

Q. Now, you say "generally in New York."

A. Yes, sir.

Q. What does the location of payment depend on?

A. Well, it depends upon the ability to get into U.S. payment systems.

Q. Does it depend on an agreement between the parties?

A. Yes.

Q. As to where payment will be remade, made, that is, payment will be paid and repaidmade?

A. Dollar deposits must be paid to American banks.

THE COURT: If your bank, which is headquartered in San Francisco, accepts a dollar deposit, would that be payable through New York?

THE WITNESS: It would be payable through our Edge Act in New York.

Q. And your reference to an "Edge Act" is a reference to a subsidiary created under the Edge Act, is it not?

A. Yes.

[208] Q. What was the name of that subsidiary in 1983?

A. Wells Fargo International—

Q. Was it Wells Fargo Bank International?

A. Yes.

Q. And was Wells Fargo Bank International a member of the New York Clearinghouse?

A. Yes.

Q. And so it is your understanding that the parties frequently agreed that payment is to be made in New York through members of the New York Clearinghouse.

Is that correct?

A. Yes.

Q. In this case, that is, the case of the deposits at issue here, could payment have been made in Manila consistent with the agreement of the parties?

A. No.

Dollars are the currency of the U.S.

Dollars in an Eurodollar transaction never leave the U.S.

Q. And so in your view, sir, it would not have been proper for Citibank to attempt to make repayment by handing over a bag of dollars over the counter in Manila?

A. No, it would not be appropriate.

* * * *

[210] THE COURT: You don't know?

THE WITNESS: No, because how the red applies.

THE COURT: I didn't get your answer.

Your answer is that you don't know?

THE WITNESS: That's correct, your Honor, I don't know.

THE COURT: All right.

BY MR. McAMIS:

Q. Do you have any understanding as to whether an Eurodollar deposit is payable only at the branch where it is booked?

A. Eurodollar deposit is payable in the U.S.

Q. And that is, as you have previously indicated, because of agreement between the parties?

A. Eurodollars are dollar deposit claims upon American banks that are caused by deposit transactions by other banks or branches and subsidiaries of U.S. banks offshore. Again, the dollars do not physically leave the U.S.

Q. And again, in this particular transaction, where were the dollars payable by Citibank on maturity?

A. They were payable to Wells Fargo Bank [211] International in New York.

Q. Are you familiar with an IBF? Can you tell me what an IBF is?

A. IBF stands for International Banking Facility, and is simply a booking facility that allows U.S. banks to book offshore deposits.

Q. Where are the books kept?

A. They are kept at the head office.

Q. But onshore or offshore?

A. Onshore.

Q. What is your understanding of the rates paid by an International Banking Facility? That is, are they domestic rates or Eurodollar rates?

A. They are Eurodollar rates.

Q. Even though the banking facility is located in the United States?

A. Yes.

Q. And is that by statute or regulation of the Federal Reserve, that such a facility is permitted to exist?

A. Yes.

Q. In this particular case, what is your understanding as to where the deposits were payable?

If I've asked you that, forgive me. However, I just want to make sure it is clear.

A. The deposits were payable in New York.

[212] Q. In order for the deposit to be payable in New York, was it necessary for Citibank Manila to issue any payment instructions at the time of maturity?

A. Payment instructions were agreed upon at the time the deposit was placed.

Q. And what were those payment instructions as you understand it?

A. Well, it had two parts. One was the—outlining of the movement of money from Wells Fargo Bank International to Citibank, and then at maturity, moving the money from Citibank back to Wells Fargo Bank International.

Q. Is it common or customary in inter-bank placements for payment instructions, that is, repayment instructions to be issued when the deposit is taken, or is it more common for them to be issued at or about the time of maturity?

A. More common when the deposit is taken.

Q. And it's your understanding that that's what happened here. Is that correct?

A. Yes.

MR. McAMIS: No further questions.

THE COURT: Are you ready to proceed?

MR. FISCHLER: Yes, your Honor.

CROSS EXAMINATION

BY MR. FISCHLER:

* * * *

[217] Q. And with respect to those deposits that are used in such a way that reserves are not maintained against them, with respect to those deposits, Mr. Boughey, you would agree that they are payable in London; isn't that correct?

MR. McAMIS: Your Honor, I object to this, because it exceeds the scope of direct examination. This man, this witness, your Honor, is not here to testify as an expert on Regulation D.

THE COURT: He can testify to his understanding of it.

I'll allow it.

Q. Isn't that your understanding—that those deposits accepted by the London branch against which Wells Fargo Bank does not maintain reserves, those deposits are payable in London? Isn't that correct?

A. Are you taking about London Eurodollar deposits?

Q. That is correct.

A. They are payable in New York. They were obtained by the London branch.

Q. And if they are payable in New York, it would then be required under Regulation D to maintain reserves against each and every one of those deposits; isn't that correct?

[218] A. No.

Q. It is your testimony, Mr. Boughey, that every single dollar deposit accepted by the London branch of Wells Fargo Bank, is a deposit against which Wells Fargo Bank N.A. maintains reserves with the Fed? Is that what you're telling the Court?

A. No.

MR. McAMIS: That's exactly the opposite, your Honor. It is unfair.

THE COURT: I know he didn't say that, he said just the opposite.

BY MR. FISCHLER:

Q. Mr. Boughey, you're familiar, are you not, with the term "funding base deposit placements"?

A. Yes.

Q. And isn't it a fact that the deposits at issue in this case, as you understand that term, are funding base deposit placements?

A. I don't know.

Q. Would you agree with me, Mr. Boughey, that it is a policy of Wells Fargo Bank that the country of risk for funding base deposit placements is the country into which the deposit is placed, irrespective of the type of entity with which we are placing?

MR. McAMIS: I object to relevance, your Honor.

* * * *

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[237] THE COURT: I understand that. It is wholly irrelevant for the reasons you want to.

MR. HOFFMAN: Surely.

MR. SNIDER: Then as a preliminary matter, I would like to move that Plaintiff's Exhibit 59 for identification be received in evidence. We already have a stipulation as to authenticity. It's a document I would like to later use this morning.

This is the telex from the Philippine Central Bank of December 14, 1984 that was sent to attorneys for Wells Fargo Bank stating that they had no objection to repayment by Citibank with non-Philippine assets.

MR. HOFFMAN: Your Honor, I don't think there has been any problem with regard to the authenticity of this telex or that it was sent or that it says what it says.

I do have an objection on the ground of relevance, particularly in regard to the purpose for which I under-

stand it is being offered. We have stipulated, we have conceded, indeed, we have argued that Citibank has all kinds of assets outside the Philippines, so I think this letter is irrelevant to the issues before your Honor.

THE COURT: This letter has nothing to do with [238] whether the Philippines has assets—I mean, whether Citibank has assets, it has to do with whether the Philippine government objects to the use of those assets.

MR. SNIDER: Exactly, and that is the point that it is being offered.

MR. HOFFMAN: On that point, too, I will concede and I think that that is what this document says that the Philippine government doesn't have any objection to Citibank using non-Philippine assets to buy plaintiff's claim or otherwise discharge that claim.

What is prohibited and what is at issue in this case is whether the Philippine decrees have a bearing on the Philippine deposit.

If you have a deposit with a bank, the bank owes you money, you have a claim against that bank if they fail to pay you that money when it is due.

I can buy that claim from you. That doesn't mean that the bank deposit is mine when I purchase it from you, and the assets that I use to buy that claim are a matter of no concern in this case to the Philippine government. That's the only point.

THE COURT: Will you concede the facts stated in this telegram?

MR. HOFFMAN: Sure. We have all along, your Honor. We did that in the context of the summary judgment [239] motion when I took the same position I am now.

Surely there is a legal issue as to the consequences of what is said here. That's what this case is really all about. So on that basis I don't care whether this thing goes in or not, because I am prepared to argue that the point that it is trying to make is irrelevant to what your Honor is deciding.

THE COURT: I understand.

MR. HOFFMAN: That is my position. So it isn't a documentary issue.

THE COURT: Then you don't care whether it goes in or not, he wants it in, we try to make everybody happy, then it goes.

MR. HOFFMAN: Fine.

MR. SNIDER: Thank you, your Honor. We will argue at the appropriate time, but we don't need to argue about that now.

THE COURT: Right.

(Plaintiff's Exhibit 59 marked for identification was received in evidence.)

* * * *

TESTIMONY OF GILLARD L. SCHMIDT

* * * *

[363] Q. So, for example, if they wanted to place a deposit with or make a loan to or otherwise extend credit to a foreign subsidiary of an American bank, your Asia-Pacific zone would be involved to some extent in the passing of that? Is that what you're saying?

A. Well, we would have to, because we would have to make sure that we kept track of the country exposure that was involved in that particular transaction.

Q. Okay.

A. And I basically was the one that they would come to and say, you know, what is our exposure in XYZ country? So I had to have the resources to monitor that.

Q. And again, just speaking generally now, not about any particular bank or situation, Mr. Schmidt, what if it was an extension of credit to a foreign branch of a bank that was based in the United States and had its home office there as opposed to the subsidiary relationship, did the Corporate Banking Division then have to come to you

if it fell within the Asia-Pacific zone and get your approval?

A. We treated branches of financial institutions in a very distinct way. It was a common practice way, I might say.

Branches of foreign institutions—[364] basically, branches of banks were treated as part of the bank itself, both for credit purposes and for country-risk purpose.

So that if a bank had its home office in the United States for inter-bank deposits that Marine may place with that bank, we would treat that foreign branch as part of the home-office or head-office institution. And that was a practice that was consistent with our treatment of Japanese banks, say, or German banks. We were lending to a banking institution in the inter-bank depository market, we would be treating those branches as if they were extensions, if you would, of the absolute home-office institution.

THE COURT: If a Japanese bank had an office in Bonn, it would be your responsibility?

THE WITNESS: That is correct.

THE COURT: Or if a German bank had an office in Manila, it would not be your responsibility?

THE WITNESS: That's correct, your Honor, it would not be my responsibility.

BY MR. SNIDER:

Q. And if a Japanese bank had a branch in the United States, that would not be part of your responsibility?

A. It would very definitely be part of my responsibility.

* * * *

[368] Q. So you looked at the creditworthiness of the bank as a whole in making these determinations as to the overall creditworthiness?

A. That is correct.

Q. Did you have separate credit evaluations for each of the branches of this banking institution?

A. No, we did not. And it would have been very impractical to do so, since most branches of financial institutions do not publish generally individual branch statements. It would be very hard to get that kind of information to make a reasonable credit judgment on an individual branch.

Q. Well, Marine Midland's practice, apparently from your testimony, Mr. Schmidt, was that it looked at the bank as a whole as an institution in determining its creditworthiness and then determining what the total line of credit would be; is that correct?

A. That's correct.

Q. You also did have country limits within which you had to look and follow when making extensions of credit, you've testified about that.

Correct?

[369] A. Very definitely.

Q. Well, Mr. Schmidt, in 1983, in placing deposits with Citibank—let me first ask you this: Did Marine Midland place some deposits with Citibank which were booked at its Manila branch in 1983?

A. Yes, it did.

Q. In approximately what amount?

A. Approximately $20 million.

Q. In 1983, Mr. Schmidt, when those deposits were placed with Citibank and then booked at the Manila branch of Citibank, would Marine Midland's trader, under your policies and guidelines that you've just described, have checked to see whether there was sufficient

room under the $150 million Philippine country limit in extending that credit?

A. No.

He would have checked to see if there was room under the global deposit line for Citibank.

Q. Well, did that extension of $20 million, did that count as part of your overall $150 million of allowable exposure in the Philippines?

A. No, absolutely not. It was totally separate.

Q. Did you have any country limit for the United States?

A. As a matter of policy, since our home office is [370] in the United States, we do not view the United States as a country that has a country limit for a U.S. bank.

Q. So, Mr. Schmidt, in making or placing deposits with Citibank, even if they were booked at its Manila branch, the only limit that had to be checked was the overall global limit that you had for Citibank and you did not have to check any country limit.

Is that your testimony?

A. That is correct for inter-bank deposit placements.

Q. Now, you did have the approval responsibility for extensions of credit to the Philippines, did you not?

A. Yes, I did.

Q. And when Marine Midland did deposit money, inter-bank deposits or make loans to Philippine-chartered banks, that was something that came across your desk and you approved, wasn't it?

A. Definitely.

Q. Did these deposits in 1983 that Marine Midland placed with Citibank that ended up being booked at its Manila branch in the approximate amount of $20 million, did those come to you for your approval?

A. No, they didn't.

* * * *

[373] Q. Coming back to that, Mr. Schmidt, based on your understandings of Marine Midland's practices that

were followed and that you were involved in, did the way that Marine Midland treat its deposits in 1983 with Citibank that happened to be booked at Citibank's Manila branch, did that fall within Philippine risk or U.S. sovereign risk?

A. That would have fallen within U.S. sovereign risk.

Q. Would it have been Philippine risk or U.S. sovereign risk if it had been a loan to a Philippine charted bank?

A. That would have been a Philippine country risk.

THE COURT: What would it have been if instead of Citibank branch it was a Citibank wholly owned subsidiary?

THE WITNESS: We treated subsidiaries differently from branches.

THE COURT: How would you have treated the subsidiary?

THE WITNESS: When we looked at the a subsidiary, we evaluated separately for credit and for country risk, and if it didn't stand on its own, then we included it both for credit and country risk in the country where it was incorporated.

THE COURT: So it would come within the [374] Philippine limit?

THE WITNESS: That is correct.

Q. Is the reason that Marine Midland treated a deposit with a Philippine charted bank as being Philippine risk is because that is where the home office of the bank involved was located?

A. That is correct.

Q. And is the reason that Marine Midland treated a deposit with Citibank which happened to be booked at its Manila branch as a U.S. sovereign risk because that's where the home office of that bank was located?

A. That is correct.

Q. And was that policy consistently followed at Marine Midland?

A. Absolutely consistently followed.

Q. Mr. Schmidt, are you generally familiar with the practices of Marine Midland going beyond now the question of risk and so on of how these interbank deposit placements and transactions were made with respect to U.S. dollar deposits?

A. Generally familiar with the procedure.

Q. Are you also familiar with the practices that are ordinarily followed by international banks who on a daily basis deal in interbank deposit placements in Eurodollars and other currency?

[375] A. Yes, I would say I would, I am.

Q. That is a subject that you have been involved with for a long time at Marine Midland, is it not?

A. Correct.

Q. In your experience in dealing with other bankers on both sides of these transactions, Mr. Schmidt, what has been the practice as far as you understand it that has been followed in terms of placing these interbank deposits in terms of your testimony as to where the sovereign risk was and how the home office or the foreign branch office came into play?

A. In general terms, my experience would show that most banks would have established a single global limit for interbank deposit placement with a financial institution, they would have allowed those deposits to be placed with any branch of that institution and they would have expected the home office of that institution to stand behind those deposits wherever they may have been booked.

THE COURT: You say that is your general experience?

THE WITNESS: That is my general experience.

THE COURT: Are you aware of any exceptions to that?

THE WITNESS: I am not aware of any exceptions to that.

[376] Q. Once you had this overall credit limit with Citibank, did Marine Midland really care which foreign branches that these particular deposits may have been booked at?

A. No. The trader in the capital markets area would have had discretion to place those at any branch.

THE COURT: What would have motivated him to pick one foreign branch over another?

THE WITNESS: Probably he would have gotten a call from a particular branch or a call through a broker looking for funds for a particular branch.

Q. In your previous answer you said it was generally your experience and as you understood it the experience in the banking field, one, that there would have been an overall global limit for such a bank, two, that the banks would have looked to the home office of the bank for repayment even if the deposits had been booked on the books of a foreign branch.

Can you tell us what practices and what experience you base that statement on?

A. Well, conversations with other banks, experience in the market itself, I guess the accumulated knowledge over a 15 year period watching the interbank deposit market develop.

Q. What about the way you had your credit committee [377] setup at Marine Midland bank and your approvals, was that practice and setup, was that consistent with the view that you just expressed?

A. It certainly was. After all, I think we have covered the point that a credit approval for an interbank deposit line would be handled by the relationship manager who handled the relationship with the head office of a financial institution.

Q. What is your understanding as a banker who has now been in this field with Marine Midland for several years as to whether in the circumstance where a U.S. dollar deposit was placed, an interbank deposit was placed, it happened to be booked in a foreign branch of a U.S. based bank, as to whether or not you would expect repayment of that deposit from the banking institution as a whole?

A. I would expect the banking institution as a whole to make every effort possible to pay that deposit at maturity.

Q. What if there were a moratorium imposed by the foreign government where the branch happened to be located, would you still have that same expectation?

A. I would have that expectation that it would do everything in its power to repay—

THE COURT: Why do you have to say everything in its power, if it has the money why wouldn't it pay the [378] money?

THE WITNESS: I would think that is a very good question. I would expect it to repaid.

Q. If it had the money, even if there were a moratorium in the country where the branch was located, under your understanding of the practice and custom in this industry, what would you have expected to happen?

A. I would have expected the deposit to be paid. The onus really is on the branch that has taken this interbank deposit in funding and the home office of that branch to arrange their funding affairs so that they can repay their deposits in the interbank market at maturity.

We are not talking about five and dime deposits, we are talking about lump sums 1, 2, 5, 10 million dollars.

Q. Do you know of any instance—and I don't want to characterize this particular one so I am including the Citibank situation—but do you know of any instance where a major money center bank has taken the position that it is not obligated to repay deposits because the government where the branch was located adopted a moratorium which prevented repayment with local assets?

A. Except for Citibank, no, I know of no instance.

Q. This is the first time you ever heard of it?

A. That is correct.

MR. HOFFMAN: Objection.

* * * *

[380] Q. When placing a deposit with a Philippine chartered bank in 1983 or other extensions of credit, did Marine Midland receive a risk premium that was higher than the interbank deposit interest rate that we could call for lack of another word LIBOR, the London Interbank Offer Rate?

A. Yes, indeed we did, and that generally would have been in the vicinity of 100 to 150 basis points, a point or point and a half—

Q. About one or one and a half percent interest higher?

A. Correct.

Q. Did you receive that risk premium from Citibank when you placed these deposits with Citibank that happened to be booked at their Manila branch?

A. No, we did not.

Q. What do you mean by a risk premium?

A. If you look at the interbank deposit rate as basically being the rate that wholesale top tier banks buy and sell deposits in the market at, a risk premium would have been a spread above that that a lender would feel compensated him for the risk that he was, in fact, taking.

THE COURT: Kind of like points above prime in the local market?

THE WITNESS: Exactly, yes.

* * * *

[388] Q. What you did, please.

A. I talked to the people in capital markets in charge of funding and in general, yes, looked into the deposit placement booked at the Manila branch of Citibank.

Q. When you then did that investigation and talked to the other people at Marine Midland concerning this particular situation with Citibank, did you ever learn from any of the other people at Marine Midland or see in any documentation that Marine Midland had been ad-

vised by Citibank that repayment of those deposits that were booked at the Manila branch would be limited to assets on the books of the Manila branch?

A. I never saw any documentation or heard any verbal report that anybody at Citibank advised anybody at Marine.

Q. Did Marine Midland receive a telex at some point in time from Citibank concerning whether it was going to repay these deposits?

A. We received a series of telexes over time, and I think among many, one of them cited the fact of the moratorium in the Philippines, expressed their desire and willingness to repay the deposit, except for the fact of the moratorium.

* * * *

[390] Q. I am going to ask you more about this document in a minute, but let me first get your recollection without the document.

Did Citibank at some point in time come to Marine Midland and offer to increase the interest rate that was being paid by Citibank to Marine Midland on these deposits?

A. Yes.

Q. What was the nature of that offer?

THE COURT: It says so right here.

MR. SNIDER: I wanted to get his recollection and then—

THE COURT: Why do you want his recollection when it says it right in the document?

A. My recollection is they came back and offered us a spread margin of $1\frac{1}{8}$ percent .

MR. HOFFMAN: Your Honor, we don't have any objection to this document going into evidence, if that's what this is getting at.

MR. SNIDER: I would like to offer it into evidence, your Honor.

* * * *

[396] Q. You can go ahead and answer the question if you remember it, otherwise we will read it back?

A. Could you, please.

MR. SNIDER: Could you read it back, please.

(Question read)

A. I didn't come across any bank that thought that its deposits with Citibank Manila branch were subject to Philippine sovereign risk.

Q. On the other side of that, in your discussions with these other banks, then, Mr. Schmidt, with respect to this issue of what the custom and practice of the industry was, did other banks right after Citibank refused to repay express the view in their conversations with you that in their view this was U.S. sovereign risk?

THE COURT: I will exclude that, what they said. The failure of anyone to say the other seems to be irrelevant. What they did say seems to be less relevant.

MR. SNIDER: Your Honor, this is a custom case and I certainly think that it is an exception to the hearsay rule because it goes to the state of mind of these other banks.

We cannot possibly have every other bank come into the courtroom—

* * * *

[404] THE WITNESS: Right.

THE COURT: So, as far as you know, they didn't have any deposits?

THE WITNESS: That is a supposition.

THE COURT: All right.

BY MR. SNIDER:

Q. Did Marine Midland's practices, with respect to these country limits and credit limits that we've discussed earlier in the testimony, did that change in 1984 and thereafter, that is, after this Citibank situation arose?

A. Yes.

In light of —

Q. Just yes or no, did it change?

A. Yes.

Q. Okay. Now, can you describe for me how it changed, if it did?

A. Yes, it did change.

Basically, counselor, in light of what we viewed at that time as an unilateral change in the rules of the game, we basically went back and said that we would no longer place deposits in branches of any bank that was located in a country which in our scale of A to E, was rated less than a A or a B.

So, it basically altered the way we looked at the world as far as the acceptability of placing inter-bank [405] deposits.

Q. I want to try to place this in time as carefully as I can.

Was it the imposition of the Philippine moratorium that brought about that change or Citibank's refusal to pay?

A. Citibank's refusal to pay.

Q. So, as best you can place it in time, when did the practice change at Marine Midland?

A. It would have been in early 1984.

THE COURT: Well, wouldn't it have been very simple just to require a statement by the lending—by the deposit bank that they would pay out of New York? I mean, it seems to me that all you had to do was to continue these telexes that computers generate.

THE WITNESS: I would say, your Honor, that the deposit market or inter-bank market was put into a little bit of turmoil by this. And I think everybody pulled in their horns and said: Hey, wait a minute, what we thought were the customs and practices are no longer the customs and practices.

* * * *

TESTIMONY OF DONALD HOWARD

* * * *

[444] Q. Citibank's foreign branches accept Eurodollar deposits, do they not?

A. They do.

Q. Describe Citibank's policies with respect to head office responsibility for foreign branch deposits.

A. A branch of Citibank is, for credit purposes, a branch of the whole; that no branch of Citibank would be [445] permitted to fail so long as the whole was whole.

However, every branch of Citibank anywhere in the world must comply with the law of the land in which it is doing business. So head office accepts credit responsibility for every activity of Citibank branch, but does not accept responsibility in situations where to do so would violate the law of the land.

Q. Have those policies been stated in writing?

A. Yes, they have.

Q. Mr. Howard, I will hand you a document that has been marked Defendant's Exhibit I for identification. Will you take a look at it, please, and then I will ask you a question.

(Handing to the witness)

(Pause)

Do you recognize Defendant's Exhibit I for identification?

A. I do.

Q. What is it?

A. This is a letter written by Walter B. Wriston to Roy Dickerson, our senior vice president in charge of London at that time, dated November 21, 1973.

Q. Have you seen that document before?

A. Yes. I was—I helped prepare it.

Q. How was it disseminated?

[446] A. This letter itself was sent to London and Mr. Dickerson took the letter to the bank who made the

inquiry. The letter was subsequently, over the years, been sent to a great many of our clients, customers, branches. It is a basic document to the corporation.

Q. Mr. Howard, I will hand you another document which has been marked Defendant's Exhibit H for identification. Will you take a look at it, please.

(Handing to the witness)

(Pause)

Do you recognize it?

A. I do.

Q. What is it?

A. This is a page from our Citicorp policy manual on commitments of overseas Citibank branches.

Q. Mr. Howard, you will note the document has a date in the upper right-hand corner reading August 1983.

A. Yes.

Q. Were the policies stated in that document the policies in effect in June of 1983?

A. I believe this was word for word the letter that was written in 1973. There has been no change in the policy even prior to 1973 this has been a consistent policy.

Q. What has been Citibank's policy in response to inquiries from customers regarding its custom and practice [447] in regard to head office responsibility for foreign branch deposits?

A. Our policy has been to enumerate this policy to the customers to tell them that, indeed, we accept credit responsibilities for our branches overseas in accordance with local law.

Q. What experience has Citibank had with requests by foreign branch customers for guarantees by the head office of branch liabilities?

A. Over the years we have had a number of inquiries as to whether we would guarantee the operations of our

overseas branches. To my knowledge, we have never issued such a guarantee.

Q. How were the accounts of the foreign branches maintained?

A. Each branch around the world has its own set of figures. The activities of every branch are recorded at each branch. Then each—the branches in each country are consolidated into a country report, they are sent to New York and consolidated in our overall worldwide position.

Q. Are there central records at the head office of foreign branch depositors' Account?

A. Depositors?

Q. Depositors?

A. No. We do not maintain separate records in any [448] central location of depositors.

Q. Mr. Howard, how are Eurodollar transactions of foreign branches settled?

A. They are settled very much like paying a bill to Con Ed. If a customer writes a check on his bank made out to Consolidated Edison, he sends it to Consolidated Edison, Consolidated Edison takes it to their bank and his bank, Consolidated Edison's bank then presents it to the bank of the person who wrote the check. The check is written on a bank.

Eurodollars are settled the same way. There are four parties to the transactions. There is the depositor, there is the depositor's bank in the United States, there is the receiver's bank in the United States and there is the lender, and it is settled exactly the same way.

Instructions are given by the depositor to pay to a designated bank, that bank having been designated to receive the funds by the borrower, and they are settled.

Q. Describe Citibank New York's role and responsibilities when acting as the New York clearing correspondence for a non-affiliated overseas bank customer.

A. We act on instructions of our client. If our client tells us to pay, we pay, provided they have the funds in their account.

* * * *

[453] Q. Do you know what the interest rates were on the deposits at issue in this litigation?

A. Yes, I do. They were 10 percent for a six month deposit.

Q. For how much?

A. For two deposits of a million dollars each.

Q. What was the rate for a deposit of similar tenor and amount payable by Citibank in New York at the same time?

A. In New York?

Q. In New York.

A. 8.85.

Q. Would you briefly describe the policies and practices Citibank follows in managing sovereign risks?

A. Citibank has been in the international banking business for a long time. We have learned that one of the major risks we have to control is our sovereign risk, and by sovereign risk I mean the risk that a government may not pay or may not permit its own citizens to pay obligations properly due.

Citibank has a committee at the policy committee level of the bank, at the top levels of the bank. I'm a member of that committee. We review our exposure in every country around the world. We set limits on that exposure every country around the world. We monitor our exposure on [454] every country around the world on a monthly basis. We set limits and it is very—we are very strict about having those limits exceeded.

We regard a deposit with a bank outside the country of its origin as having two sovereign risks, the risk of the place at which the deposit is made and the sovereign risk of the country in which the head office is located.

For instance, a deposit with the New York branch of the Banco do Bresil would be regarded by Citibank as carrying Brazilian risk. A deposit with the Banco do Bresil in London would carry both London sovereign risk, U.K. sovereign risk and Brazilian sovereign risks.

Q. Why have those policies been adopted?

A. Because we have lost a lot of money over the years and we have learned.

We know that when a country gets into difficulty, one of the first things that they do is ask their banks to bring their foreign currency home and when they do that then the foreign currency is in the country of origin irrespective of where it was deposited. Clearly the Brazilian situation recently is an example of that.

Q. What understanding do you have of the custom among other international bankers with respect to the managing of sovereign risk?

[455] MR. SNIDER: Your Honor, I object. I don't think that he has established that this witness yet has any understanding.

MR. HOFFMAN: Your Honor, I think it has been established that this witness has as good if not better understanding of that subject as everybody else who has testified here previously. He spent 25 years in the Eurodollar business, he is chairman of the CFO committee of the American Bankers Association.

THE COURT: It seems to me he is qualified to testify.

A. Would you like to repeat the question?

MR. HOFFMAN: Mr. reporter, could you read the question.

(Question read)

A. Over the years I have had occasion to talk with senior management of a large number of the world's most active international banks. We discuss sovereign risk and management of it.

I have no reason to think that our policies are unique. I think we are perhaps ahead of many others, but certainly the major participants in the international markets that I am aware of recognize sovereign risk and control it.

* * * *

TESTIMONY OF GUNTER DUFEY

* * * *

[479] Q. Dr. Dufey, have you been asked to determine whether or not you could form an opinion concerning the circumstances in this case on the question of whether or not bankers involved in the international bank deposit market, by matter of practice and custom, would have expected Citibank, the institution here, to repay the deposits under the circumstances where a debt moratorium had been imposed by the Philippine Government, limiting repayment of those deposits so that local Philippine assets booked at the Manila branch could not be used for that repayment? Can you answer that question yes or no?

A. I'll be happy to answer that question.

Q. And have you formed an opinion on that question?

A. I have formed an opinion.

Q. What is your opinion, Dr. Dufey?

A. The opinion is that bankers being in the deposit business are very conscious of deposit obligations. Therefore, most banks expect to be repaid unless that is totally out of the ability of the institution. I'm thinking here of bankruptcy or something along these lines.

To put it positively: Bankers expect that the deposit-taking institution makes every effort to repay the [480] deposit, to return the deposit.

Q. Do you distinguish in your opinion between the ability of a foreign branch, in this instance the Manila branch, to repay, or the ability of the institution to repay?

A. Bankers regard branches as part of the bank. In the interbank market, counselor, bankers put a great deal of emphasis on always placing with an entity that is a branch or the head office, when applicable.

Q. Well, in your opinion, Dr. Dufey, given the practice and understanding as you know of it of people dealing in the interbank deposit market, were these deposits

placed by WFAL with Citibank, the institution, or just with its foreign branch in Manila?

A. WFAL and other banks thought that they had placed the deposits with Citibank as a whole.

MR. HOFFMAN: Objection.

THE COURT: Why?

MR. HOFFMAN: Objection as to what he says they thought.

He can express his opinion, your Honor, on an understanding or what he speculates.

THE COURT: In his opinion, they felt that, that's all he said.

MR. HOFFMAN: I would just like to have that [481] clear.

THE COURT: Well, he doesn't pretend to be a psychic.

THE WITNESS: No, definitely not, sir.

BY MR. SNIDER:

Q. Now, Dr. Dufey, you've stated your opinion. I'd like to ask you whether you have been asked to form another opinion.

Have you been asked to form an opinion as to whether under the bankers's practices and customs as you understand it, based on your experience, in placing an interbank deposit such as this with Citibank that was going to be booked at Citibank's Manila branch, whether the depositor would have assumed Philippine or U.S. sovereign risk?

A. Virtually all banks that I know of would have thought that to be a Citibank risk.

Q. What do you mean by a "Citibank risk"? Citibank was in both places, it had a branch in Manila and a home office in New York.

A. Citibank worldwide.

Q. Where would the risk be, then?

A. With all of Citibank's resources. In other words, bankers expected that Citibank would return these funds using all of their resources at their disposition. [482] worldwide.

Q. Even if there were a moratorium in the Philippines saying that they couldn't use assets in Manila?

A. Bankers, traditionally, do not tie the deposit directly to the assets.

Even I, when I make a deposit in my bank in Ann Arbor, Michigan, I do not concern myself with what the bank will do with the funds, I'm only concerned with receiving the funds bank.

Q. Well, when you go to the bank that you deal with on, let's say, South University Street—is that where you bank?

A. That is correct.

Q. I spent ten years in Ann Arbor myself.

You go to the bank on South University Street and you've made a deposit and you go to ask for your money back, do you ask them for the same dollars that you put in?

A. Obviously not.

Q. But you expect to be repaid, in any event?

A. I expect to be repaid no matter what the fortunes of the bank's assets are.

Q. And that's also true, isn't it, Dr. Dufey, in the Interbank deposit market?

A. That is no different in the interbank deposit market.

* * * *

TESTIMONY OF DONALD HOWARD

* * * *

[487] Q. I would like to direct your attention to the second paragraph, which reads, "As you know, Citibank is a single corporate entity which conducts its business at a number of locations throughout the world. Our head office, our domestic branches and our overseas branches are all integral parts of a single institution. Thus, an engagement by any of the branches is an engagement by the institution."

That is Citibank's position, isn't it?

A. It's not the end of the letter, but that's Citibank's position as far as it goes.

Q. But that's true so far. Okay.

Let me just focus in on the last sentence of that paragraph.

It is correct, is it not, that an engagement by any of Citibank's branches is an engagement by the institution?

A. That's what the letter says.

Q. And that is the policy?

A. Yes, it is.

THE COURT: And you drafted that letter, as I remember?

THE WITNESS: I helped draft it, yes, Judge.

That happens to be a legal settlement, not my [488] contribution, but, yes.

Q. I notice at the top of this letter, Mr. Howard, it says, "I understand that you have received an inquiry from one of our banking friends as to Citibank's position."

Were these kinds of letters sent out at times when inquiries were received by Citibank concerning its position?

A. Yes.

Q. Were they also sent out, though, as a regular matter to all of the banks that you were doing business with whether they inquired or not?

A. No.

Q. So if Wells Fargo didn't inquire as to your position on this subject in a given transaction, you would not have sent Wells Fargo a letter, would you?

A. No. We didn't send things where it was a market practice.

Q. And, therefore, you didn't send this type of letter to most of your customers, did you?

A. On inquiry.

Q. Most of them didn't inquire, did they?

THE COURT: You must have a record of who you sent that letter to, don't you?

THE WITNESS: Judge, not I.

THE COURT: But the bank must have?

[489] THE WITNESS: I doubt that we keep a specific record of this letter going back that far, Judge.

I am personally aware of it having been sent out a half a dozen times.

But in addition to that, of course, the policy would have been enumerated by various and sundry officers of the bank as they discussed it with other people.

Q. Do you know of any specific discussion?

A. Yes. I have had them.

Q. With Wells Fargo Bank?

A. Not with Wells Fargo Bank.

Q. Thank you.

Would you call this a comfort letter?

A. No. It's a statement of policy, it's not a comfort letter, it's not a guarantee.

THE COURT: It's not a what?

THE WITNESS: It's not a guarantee, Judge.

Q. What is a guarantee?

A. A guarantee says we guarantee.

Q. It's a commitment to honor an obligation?

THE COURT: Of somebody else?

Q. Of somebody else, a third party?

A. I believe so. That's the legal term. I'm not a lawyer.

* * * *

[493] THE COURT: You better ask the question over again.

Q. Does Citibank accept the responsibility for a deposit at one of its branches where to do so would not violate local law or regulation?

A. Yes, at the place of deposit.

Q. You don't accept the obligation at Citibank, the institution, even if there is nothing with respect to the local law or regulation that would prevent repayment?

A. If the local law permits repayment, it would be repaid at the place of deposit.

Q. Let me come back to my question. You changed the example. I want to get your testimony on this.

Does Citibank accept responsibility for a deposit where I am specifying that local law or regulation does not prevent or prohibit repayment?

A. My reply is at the place of deposit.

Q. And you would only accept responsibility there and nowhere else?

A. Correct.

A dollar deposit made in London is not payable in New York.

MR. SNIDER: Your Honor, I move to strike that last answer. I don't believe any question was even asked.

THE COURT: That's correct.

[494] THE WITNESS: Excuse me. Excuse me.

THE COURT: Our tribal customers are you can't volunteer.

THE WITNESS: Excuse me, Judge, excuse me.

Q. So if Citibank can pay and at the same time comply with all applicable laws, it is Citibank's practice to pay because, as you said in your letter, an engagement by any other branch is an engagement by the institution, right?

A. To pay at the place of deposit.

Q. Did you tell Wells Fargo in this transaction about that interpretation of your policy?

THE COURT: He personally?

Q. You personally.

A. No sir. I was not a party to this transaction.

Q. And you are aware, aren't you, of the stipulation in this case, Mr. Howard, that we have reached with your attorneys that there were no oral discussions in which anybody from Citibank or any broker told Wells Fargo or any of its brokers or agents in this matter about some limitation on repayment of these deposits?

A. I'm sorry, that has not been discussed.

MR. HOFFMAN: Excuse me, your Honor. I beg the Court's indulgence, I was conferring with my colleague a moment.

* * * *

[496] Q. Which means you don't always?

A. No, we do not always. It would depend on the bank and the country that it was being deposited in.

Q. Yesterday you described the way in which dollar deposits are paid and repaid.

You understand, don't you, that in this case the deposits to be repaid to WFAL's account with Wells Fargo Bank International, what is known as WFBI, in New York?

Can you answer that question yes or no?

A. Yes.

Q. And the answer is yes?

A. Yes.

Q. You would agree, won't you, that the funds were to be transferred from Citibank in New York to Wells Fargo Bank in New York? Yes or no?

A. Yes.

Q. And even if Citibank had in this case designated an independent correspondent bank, such as Chase Manhattan or Bank of America, for that matter, as its agent for transferring the funds, isn't it also your understanding that the funds would have been transferred in New York? Yes or no?

A. If a transfer was made, it would have been made in New York.

Q. Right. And your answer is, therefore, yes?

[497] A. No. The funds would have to be in the account.

THE COURT: The funds would have to be what?

THE WITNESS: In the account to make the transfer.

Q. If they were in the account, though, the transfer would have taken place in New York?

A. Yes. In the United States.

Q. And in this case, the parties, WFAL and Citibank, did agree that the funds would be transferred in New York if the funds were in the account, isn't that right?

A. No. WFAL instructed their bank, whoever it was, to receive funds on their behalf and Citibank Manila instructed us to pay.

Q. In New York?

A. To pay in New York to whoever WFAL had designated.

Q. And when Citibank received the funds when the deposits were placed, that transfer of funds took place in New York, didn't it?

A. I assume so. It wouldn't necessarily have had to.

Q. You don't have any reason to think otherwise in this instance, do you?

A. No, I do not. That would be the customary settlement.

* * * *

[538] THE COURT: Oh, that's right, you were kept outside of the courtroom.

—who testified that he'd been involved with Marine Midland in this area. And before Citibank took this position in the Philippines, he had never heard of such a policy.

Do you have any information that would suggest that he was wrong?

THE WITNESS: Judge, organizations at large, and the senior managements of organizations of international banks may very well have a different understanding in view of policy than people on a trading desk.

THE COURT: Well, this man was in charge, had been in charge of a trading desk.

THE WITNESS: That's what I say, at the trading desk level.

THE COURT: Now, I assume Citibank has copies of [539] that letter that went to one person. But as far as you know, that declaration was never in any public document for general circulation until, my recollection is, August of 1983. Counsel showed you that document.

THE WITNESS: Judge, this has been part of our internal policy manual for a long time. I am not aware of any general dissemination then or since.

THE COURT: Of course, your internal policy might not necessarily be known by Wells Fargo, for example.

THE WITNESS: Judge, our internal policy is based on market practice. Not once in 30 years of dealing in the—well, let's be absolutely accurate—since 1959, 27 years. Not once in 27 years, your Honor, of dealing with top managements of banks have I ever had a bank question that a deposit was only payable at the point that it was deposited.

THE COURT: Well, have you ever had a question where this could arise, where a bank refused to make payment, as Citibank did in this case? I mean, there would be no occasion to question it if the question didn't arise.

THE WITNESS: Judge, the question has arisen at the trader level on many occasions. But as it goes up to top management, top management has always recognized that if they themselves require payment of a deposit in a place other than where it is deposited, that they will [540] subsequently themselves be obligated to make payment elsewhere. And if you do not have the funds to pay, you can get into a severe liquidity situation. And if the branch cannot pay the depositor, they also cannot make the funds available to the head office to make payment.

THE COURT: There is no question in your mind that if it was just a question of liquidity of the branch, without the Government doing anything about it, Citibank would have to pay, wouldn't it?

THE WITNESS: Yes, if it was a matter only of liquidity, Judge. But in that case, your Honor, it would be possible for the branch to remit the funds to make the payment on the deposit.

THE COURT: Supposing the branch didn't have any money at all?

THE WITNESS: Then we'd have to come up with it.

THE COURT: You'd have to come up with it?

THE WITNESS: Yes, sir, we would.

THE COURT: But you can't think of any—well, I guess that answers my question.

Thank you very much.

Are you through?

MR. HOFFMAN: I'm through.

MR. SNIDER: No further questions, your Honor.

* * * *

TESTIMONY OF GUNTER DUFEY

* * * *

[563] Q. And once that global funding limit were established, is it your general understanding of the practice that then the banks suballocate that global funding limit so that they have a particular amount that they are only willing to lend to branches in particular countries?

Now I would like to direct your attention to prior to October 1983.

A. Prior to October 1983, I think it is safe to say that the overwhelming majority of banks, at least those that I had contact with, excluded placements with foreign branches of U.S. banks from what they call country risk limit, but allocated that internally to the—regarded that or treated this as if it was U.S. risk as long as the head office of the bank was in the United States.

Q. Let us be a little more clearer on that

Prior to October 1983, did most banks that you dealt with organize themselves in such a way that when plac-

ing a deposit, for example, with a foreign branch of a U.S. bank which has its home office in the U.S. bank, did most of the banks that you are familiar with treat that as the risk of the country in which the foreign branch was [564] located or U.S. risk?

A. They treated it as U.S. risk.

Q. Then getting particular to this case, prior to 1983, would most banks have treated this deposit with Citibank which happened to be booked at its Manila branch as U.S. risk or Philippine risk?

A. U.S.—

MR. HOFFMAN: Objection. Again, your Honor, I don't mind his testifying about custom, but when he gets to a specific transaction, I think it's another matter.

He can give his opinion on a transaction and perhaps his opinion on what other people think, but I want it clear that when he does that he is giving his opinion about what other people say.

THE COURT: That's all he can do. That's all he purports to be doing.

Q. Go ahead.

A. My opinion is that most banks treated that not as Philippine risk but as U.S. risk consistent with the description that a typical bank, say Marine Midland that we heard yesterday, I guess.

Q. You are referring to Mr. Schmidt's testimony?

A. Mr. Schmidt's testimony was typical for the practice of most banks. In fact, the overwhelming number of banks, in my judgment.

* * * *

[599] Q. So, Dr. Dufey, have we asked you to look into the question of how big the spread was between domestic deposit rates and those received on Eurodollars for the same maturity?

A. From publicly available information, I obtained data that suggested that during the period, during the period of May, June and July of 1983, that difference

was in the magnitude of 50 to 60 basis points, which supports what I think nobody contests—that is—

Q. Have you prepared a chart on that?

A. Yes, I have prepared a chart. That shows that we're talking about ranges of differences which are quite consistent and which show—

Q. Well, just quickly, so we can move this along, Dr. Dufey, can you just tell the Court how you prepared this chart, what data you relied on and what it represents?

A. I simply used the Wall Street Journal, which has actual CD transactions. In other words, not only quoted rates or posted rates, but CD's of major banks traded in the marketplace. From that source, I obtained the CD rate for 30 days, and I compared it with the LIBOR rate for 30 * * *

* * * *

[609] [Q.] What conclusion, if any, Dr. Dufey, do you draw from the fact that on actual transactions in London, Frankfurt, Singapore and Manila on June 10, 1983, that the rate being paid on interbank deposit placements was approximately 10 percent in all those locations?

A. Starting from the basis that actions speak louder than words, the rate information that I received and looked at, which represents rates paid by bankers and taken by bankers, is consistent with what they said. And what they said was that placements with Citibank Manila were viewed by most banks as U.S. risk, not Philippine risk.

Q. Well, did you, from your experience, regard London, for example, and Singapore as being jurisdictions of equal risk?

A. I don't think the market distinguished them, between those.

Q. You're basing that answer based on these rates?

A. Well, those are dollar rates and those are rates based with major money banks, which means, particu-

larly both for London and Singapore, primarily foreign banking offices in those centers which do business, and I don't see any evidence of any country risk in there.

Q. You see no evidence of country risk in these numbers?

[610] A. No, I don't.

Q. Now, putting aside the question for a moment of where the home offices of any of the major money-center banks are located who are dealing in this interbank deposit market, but just talking about the political stability and the economic stability of these various jurisdictions, in your view, Dr. Dufey, as a financial center, are London and Singapore generally of equal risk or considered by bankers to be of equal risk?

A. There may be a tiny difference between the two, which—

Q. What about London and Manila?

A. I think definitely Manila is not in the same risk category as the Philippines.

Q. Which one would be riskier?

THE COURT: Manila is not in the same category as the Philippines?

THE WITNESS: I'm sorry, your Honor, I misspoke.

A. I was going to say that London is not in the same category as the Philippines. The Philippines, and Manila, its capital, are considered to be much more risky locations.

Q. So, even though Manila and the Philippines were riskier, in your view, Dr. Dufey, the interest rates being paid on interbank deposits both in London and Manila were [611] approximately the same, weren't they?

A. The data speaks for itself.

Q. Okay. What inference, Dr. Dufey, if any, do you draw about that fact relative to the assumption of sovereign risk by the bankers who were placing deposits in these various locations?

A. That whoever placed funds at 10 percent did not think and expect to be subject to Philippine risk but to

be—to make a transaction as if the transaction had taken place in any of the other centers. That's what these data tell me.

Q. And does that further support your overall conclusion that you stated earlier, Dr. Dufey, that you believe that the practice of bankers in the international banking market when dealing with interbank deposits is that they believe that it is the location of the home office of the bank and not the foreign branch where the risk is assumed?

A. Most banks acted that way and they talked that way.

Q. And the market data supported that?

A. The market data is part of the action, and that supports it.

* * * *

[635] Q. Dealers don't make mistakes?

A. Oh, they make mistakes, but not systematically.

Q. If they make mistakes they sometimes get fired, don't you?

A. Always.

Q. Oh, you know that for a fact?

A. Or promoted into management.

Q. Okay, that I will accept. That I will accept.

Professor, we have already defined Eurodollar deposits, and when I refer to domestic deposits I am referring to deposits maintained by a bank or a branch office in the United States.

There are differences between Eurodollar deposits and domestic deposits, are there not?

A. That is correct.

Q. And one difference between Eurodollar deposits and domestic deposits is that Eurodollar deposits are affected by certain laws, regulations and rules that do not affect domestic deposits, is that correct?

A. That is correct.

Q. These would include, for example, the laws, regulations and rules of the offshore banking center in which the Eurobank is located, right?

A. That is correct.

[636] Q. Many Eurobanks are foreign branches of U.S. banks, are they not?

A. That is correct.

Q. Would you say that because of the perceived affect of such laws, regulations and rules, bankers are con-concerned with the sovereign risk of offshore banking centers?

A. That is one aspect of sovereign risk.

Q. But they are concerned with that risk, right?

A. They are concerned with that risk, yes.

Q. And the sovereign risk of Eurodollars includes the risk that the country in which the deposit branch is located might take some action to interfere with the Eurodollar deposit, correct?

A. That is one part of the risk.

Q. And that action could be legal action restricting payment in some way, correct?

A. It is correct.

Q. In addition to the perceived sovereign risk of interference by the host country, bankers also perceive Eurodollar transactions as subject to the risk of intervention by the United States government, don't they?

A. That is correct.

Q. That's a risk that materialized in the Iranian crisis, did it not?

[637] A. That is correct.

Q. And actions similar to the Iranian sanctions has recently been adopted in the case of the Libyan Asset Control Regulations, is that not correct?

A. That is very similar.

Q. Isn't it true, Professor, that the only place large dollar transactions are cleared is in the United States?

A. Dollar transactions are customarily cleared in the United States.

Q. And that means that all dollar payments go through the United States, doesn't it?

A. All dollar payments wherever in the world are paid in the United States.

Q. Including payments into and out of Eurodollar accounts?

A. Well—

Q. Is there any question about that, Plaintiff's Exhibit?

A. Yes.

Q. In fact, all such payments go through the U.S.?

A. They do indeed go through the U.S., but—

Q. But—

THE COURT: Let him finish the answer.

A. You said something else. You said payments into [638] your dollar accounts and out of your dollar accounts. Could you repeat that part of the question?

Q. All I asked you whether the payments into and out of Eurodollar accounts go through the U.S.

A. All I can say to answer again is all Eurodollar transactions as long as they are in dollars are paid in the United States. The payments are made in the United States. I think there is no question about it.

Q. The confirmations for Eurodollar deposits customarily designate the New York correspondent for the depositor and for the taking bank, don't they?

A. That is correct.

Q. If the taking bank is a foreign branch of a U.S. bank, it would be normal for that branch to designate one of its own offices in New York as the correspondent, wouldn't it?

A. That would be normal practice.

Q. But that—

THE COURT: It doesn't have to be?

THE WITNESS: No.

Q. It could designate another bank in New York with the clearing account?

A. It could do that, yes.

* * * *

[640] A. The economic effects of Regulation D are, not the actual day to day operations, the compliance, so there is lots of—there are many aspects expects of Regulation D which I as a financial economist am not concerned with.

Q. But the policies that are to be served by the Federal Reserve Board in prolumgating Regulation D are a matter of concern to you?

A. That, that is.

Q. As an economist and as an international financial expert?

A. That is very obvious, sir.

Q. Are you aware that Regulation D does not require reserves against deposits with a foreign branch of a U.S. bank that are payable only outside the United States?

A. That is correct.

Q. And the fact that payments in and out of such an account clear through New York doesn't necessarily mean that the deposit is subject to Federal Reserve requirements, does it?

A. That is correct.

Q. Professor, you know what an IBF is, don't you?

A. I know what the international banking facility is, yes, sir.

Q. What is an IBF?

A. An international banking facility is a facility [641] that was—is a banking facility. It's essentially a set of records that a New York based bank can have which treats dollar deposits and dollar assets in that IBF, in that international banking facility similar, and I say similar, not exactly the same but similar to deposits and dollar deposits and dollar assets in foreign branches of U.S. banks.

Q. IBF's complete with offshore banks for deposits, don't they?

A. To a certain extent they do.

Q. An IBF dollar deposit in New York by a French bank, assume a French bank makes a dollar deposit with an IBF in New York, that deposit would be subject to one less sovereign risk than a Eurodollar deposit by that French bank in London, would it not?

A. It would subject the deposit to a different sovereign risk than the deposit in London.

Q. Let us go back, then.

Assume that the French bank made a dollar deposit in London.

A. I understand you.

Q. I think you already told us that that dollar deposit as we have learned at least from the Falkland Islands is subject to blocking by the government in the U.K.

[642] A. That is correct.

Q. Now, if the French bank concerned with that risk decided to avoid it and made its deposit instead in New York, that deposit wouldn't be subject to U.K. sovereign risk, would it?

MR. SNIDER: I am going to object, your Honor, to this line of questioning, because the hypothetical lacks specification as to who the bank is on the other side that this French bank is placing the deposit with and where its home office is. This is completely a nonsensical set of questions and answers. We only have one bank identified, not two.

MR. HOFFMAN: Let's assume it's Citibank. Make it Citibank.

Q. Now, if the French bank made a deposit with an IBF in New York—

THE COURT: Citibank is—

Q. With a Citibank IBF in New York rather than a Citibank branch in London, its deposit would not be subject to U.K. sovereign risk, would it?

A. That is correct

Q. Thank you.

You are aware, aren't you, that after the Falkland Islands crisis, there was a surge in IBF deposits in New York, aren't you?

[643] A. For a very short while that was correct.

Q. I will hand you a document marked Defendant's Exhibit II for identification, copy of the New York Times from Friday, May 7, 1982.

(Handing to the witness)

(Pause)

I call your attention—take a moment and read it and I will call your attention to the middle column of it.

MR. SNIDER: Your Honor, we object to the introduction of articles from the press, The New York Times and other such articles. It is clearly hearsay.

THE COURT: You offered similar things.

MR. HOFFMAN: I am going to offer the article, your Honor, under Rule 901(6) your Honor, as self-authenticating.

(Pause)

* * * *

[645] Q. For example, a Libyan bank wouldn't put dollars into an IBF, would you expect?

A. I doubt it.

Q. Rather, it would put its dollars in a bank in some country friendly to Libya, wouldn't it?

A. Probably.

Q. Eurodollar deposits normally carry a higher interest rate than domestic deposits; correct?

A. That is correct.

Q. And that was so in June of 1983, was it not?

A. That is correct.

Q. It's fair to say, isn't it, Dr. Dufey, that in order to attract dollar deposits away from accounts in the United States, Euro banks have to offer and be able to

pay a higher interest rate than available in the domestic market?

MR. SNIDER: I'm sorry, could I have that question read back, please. I missed it.

(Record read)

A. Euro banks are able to pay higher rates than domestic banks because they're void of the costs—

[646] Q. Well, did—

MR. SNIDER: Let him finish his answer, please.

A. —of reserve requirements.

Q. Well, Doctor, do you take issue with the statement in my question?

THE COURT: The question is—never mind their ability to pay it—do they have to pay it? Assuming they have the ability. I assume if they didn't have to, they wouldn't use the ability.

THE WITNESS: That is correct, sir.

But in a competitive market, they're forced by competition to pay a higher rate.

THE COURT: That's right. Well, that's what he's asking you. They're forced to pay the higher rate in order to get—

BY MR. HOFFMAN:

Q. In order to get the funds and attract them away from the U.S.?

MR. SNIDER: I object to that. He said it had to do with the costs, not to attract funds.

THE COURT: He said costs give them the ability to pay the higher rate.

What he's asking is, does the competition require them to pay the higher rate?

The witness said the answer is yes.

[647] A. Competition requires the banks, to be precise, to pass on this cost advantage to the customer, that is, the depositor.

Q. Professor, you would agree, wouldn't you, that it is generally understood by bankers that if a foreign

branch office wrongfully refuses to pay a deposit, the home office will be liable?

A. Yes.

Q. You would also agree, wouldn't you, that bankers understand that the liability of the home office for deposits taken by its branches is not without limitation? Would you agree with that statement, Doctor? Just answer me yes or no.

A. Without any limitation, no.

Q. I'm sorry, is that a yes or a no?

Would you agree with the statement that I made in my question?

Do you want me to say it again?

A. Please.

Q. Bankers understand that the liability of the home office for deposits taken by its branches is not without limitation; correct?

A. That is correct.

Q. Bankers understand that; correct?

A. Bankers understand that, yes.

[648] Q. In fact, bankers understand, don't they, that home-office liability for branch deposits is qualified by the consideration that a bank's liability generally will be measured by the law of the jurisdiction where the foreign branch is located.

Would you agree with that statement?

A. That was a very long statement. Could you please repeat it?

Q. I'll be happy to.

Bankers understand, do they not, that home-office liability for branch deposits is qualified by the consideration that a bank's liability generally will be measured by the law of the jurisdiction where the foreign branch is located?

A. That's what I understand.

Q. The basis for your understanding has been your experience with bankers active in the Eurodollar markets; correct?

A. Correct.

Q. You've talked with them, have you not?

A. Correct.

Q. And you've come to an understanding of their perceptions, have you not?

A. Yes.

* * * *

[660] Q. With the Republic Bank in Manila?

A. That is correct.

THE COURT: In Singapore?

THE WITNESS: No, your Honor.

It was made in Singapore but placed with the Republic Bank in Manila. I don't want to complicate things.

BY MR. HOFFMAN:

Q. Now, Professor, there is a reference on the confirmation and on the dealer's ticket that says, "We pay to Bankers Trust New York"; correct?

A. That is correct.

Q. And the "we" is Wells Fargo Bank, N.A., Singapore office, isn't it?

A. That is correct.

Q. And the bank that took this deposit is Republic Planters Bank in Manila, Philippines, isn't it?

A. That is correct.

Q. And the fact that the confirmation says, "We pay to Bankers Trust New York," only indicates that that's the clearing bank in New York for Republic Bank in the Philippines, doesn't it?

A. That's where the deposit was paid, yes, sir.

[661] Q. Well, that wasn't a deposit with Bankers Trust in New York, was it?

A. No.

Q. It was a deposit with Republic Planters Bank in Philippines; right?

A. That is correct.

Q. And by the same token, the significance, the significance of the reference to Wells Fargo Bank International New York is simply that that's the clearing bank

in New York for Wells Fargo Bank, N.A. Singapore; correct?

A. Correct.

Q. So we have four institutions—Wells Fargo Bank, N.A. Singapore office—

A. Right.

Q. —Wells Fargo Bank International New York—

A. Right.

Q. —Bankers Trust Company New York—

A. Right.

Q. —and Republic Planters Bank, Manila; correct?

A. Right.

Q. And the depositor in that at the time is Wells Fargo Bank, N.A. in Singapore; correct?

[662] A. It looks like it, yes.

Q. Now, is this a sort of typical Eurodollar transaction, Professor?

A. That could be a Eurodollar transaction or it could be simply a dollar loan or deposit to a Philippine bank.

Q. You make the reference to "loan," don't you, because the first sheet has a legend on it called "deposit placed in lieu of loan," doesn't it?

A. That is correct.

Q. And do you have any knowledge of the significance of that legend, Professor? Do you know what that means, Professor?

A. Only since I heard the testimony yesterday.

Q. And isn't it your understanding that that's on there because this particular deposit area institution was one of a lesser credit rating? Isn't that correct?

A. That's what I heard. That's how Wells Fargo apparently uses this term.

Q. This deposit was made with a lesser-credit-rated institution; correct?

MR. SNIDER: I'm going to object to that. Lesser than what? The question is—

MR. HOFFMAN: I'll withdraw the question, your Honor.

* * * *

[704] MR. HOFFMAN: Could we have that, also?

THE COURT: Do you have a copy of the book for counsel?

MR. SNIDER: I don't know if we have a copy of the book or just those pages.

(Pause)

We did not anticipate, your Honor, that Mr. Hoffman was going to repeat his Federal Reserve arguments today so I didn't bring copies along with me today. I would be happy to show him the book.

THE COURT: Why don't you show him the book.

(Pause)

MR. HOFFMAN: He has shown me the page that he is referring to, your Honor.

THE COURT: Okay.

Q. Dr. Dufey, was this book, in fact, brought out and shown to you and you were questioned about it at your deposition by Mr. Fischler of Shearman & Sterling?

A. That is correct.

Q. Let me give the book back to you.

You gave testimony yesterday that in your opinion, and it is on Exhibit 33 up here, that differences between interest rates on domestic deposits, number 8, and Eurodollar deposits almost exclusively reflect cost differences attributable to reserve requirements and FDIC [705] assessments.

That is the testimony you gave yesterday, is it not?

A. That's correct.

Q. If there is a paragraph in Mr. Riehl's book that you relied upon in giving that testimony or which otherwise confirms your conclusion, would you please read that for us?

MR. HOFFMAN: Can I be clear which conclusion it is?

MR. SNIDER: Number 8, the one I just read.

MR. HOFFMAN: Thank you.

A. The relevant sentence reads, "The premium reflects primarily the cost of maintaining reserve requirements and the cost of insuring deposits with the Federal Depositors Insurance Corporation (FDIC) in the United States."

In other words, the Eurodollar market exists because of regulations affecting the cost of funds domesticly. The Eurorates for that currency will exceed the domestic rates by a spread.

It is consistent with what I said, what Mr. Howard said, what everybody says.

Q. But not with what Mr. Hoffman said in his argument this morning, and that is the point.

MR. HOFFMAN: Objection.

[706] THE COURT: Well, that is argumentative and it is not for the witness to characterize Mr. Hoffman's argument.

Q. And then the analysis that you went through, and you had another chart yesterday, Dr. Dufey, which is now Exhibit 37, in which you compared the domestic rate with the London Interbank Offer Rate for 180 day maturities, did you not?

A. That's correct.

Q. And what kind of a spread did you come up with?

A. Between—on average using the sampling method and data from the Wall Street Journal, I came up with an average spread of somewhere between 50 and 60 basis points, which is consistent with what everybody says.

Q. And is it your opinion that that spread between the interbank deposit rate that we are talking about, London or in these other major money centers, that the spread between that and the domestic rate paid on deposits is primarily attributable to the cost factors of reserve requirements and FDIC assessments?

A. That's what the statement says, that's what Mr. Howard said, that's—

Q. Is that your opinion?

A. That's my opinion.

Q. And in your opinion, does that spread largely [707] represent, then, any elements of an assumption of sovereign risk?

A. It is explained completely by cost differences. One does not need any additional risk elements in there.

Q. Thank you, Dr. Dufey.

MR. SNIDER: Your Honor, I would now like to move into evidence Exhibits 34, 35, 36 and 37, which are the other charts that Dr. Dufey relied upon, 38 having already been received in evidence.

THE COURT: That is not that one?

MR. SNIDER: I did say I would not move on 33. The numbered charts, I would move them all in evidence.

MR. HOFFMAN: I do object, your Honor. I think they are irrelevant. I submit they present a spurious comparison and there is no comparison in those charts between the rates that were paid, assuming the data is correct, the rates paid by certain Philippine borrowers on the one hand and any rate paid by Citibank in London or elsewhere on the other hand.

MR. SNIDER: Your Honor, that all goes to the weight to be accorded to the charts. He did rely on them.

THE COURT: I think that goes to the weight. I will accept them.

* * * *

[728] Q. Isn't it also correct that most bankers do not understand that they would not be repaid if there were some limitation placed on repayment such as a debt moratorium on local assets?

A. Could you repeat that question, please?

Q. Isn't it also correct that most bankers did not understand that their deposits would not be repaid if there were some limitation on just the local assets in which the branch was located in the country of that branch?

A. That is correct.

Q. So this statement that you answered for Mr. Hoffman yesterday, in your view, does that contradict in any way your previous testimony?

A. No.

MR. SNIDER: I have no further questions at this time.

THE COURT: I would like to ask a couple of questions.

This Federal Reserve business, it seems to be generally understood that Federal Reserve Bank and relevant regulation, wherever it comes from, as a result a domestic deposit has to have reserves against it.

[729] THE WITNESS: That's correct.

THE COURT: And has to be Federal Deposit Insurance premiums paid.

THE WITNESS: Right.

THE COURT: A Eurodollar deposit does not.

THE WITNESS: That is correct.

THE COURT: Also a Eurodollar deposit which is guaranteed by the home office does have to?

THE WITNESS: If a bank issues an explicit guarantee, then it falls under the Federal Reserve regulations rule under reserve requirements.

THE COURT: What I have to find out here is the general perception in the marketplace of what all these things mean and I have to assume, I guess, that the Federal Reserve in making its regulations has some sense.

THE WITNESS: True.

THE COURT: What is the sense in distinguishing between for a reserve and a Federal Deposit Insurance purposes, what is the sense of distinguishing between a deposit for which the home office is responsible because of the general understanding of the community and a deposit for which the home office is responsible because of a specific guarantee?

THE WITNESS: I think it is safe to say from a standpoint of a financial economist that the Federal [730] Reserve is primarily concerned about the effectiveness of monetary policy as well as revenue, because one should not forget that reserve requirements provide the Federal Reserve and, therefore, the U.S. government with revenue, because reserves are noninterest bearing on the one hand and can be invested in interest bearing assets. So for at least two reasons the Federal Reserve has a strong interest that not too many dollar deposits escape Federal Reserve requirements.

The Federal Reserve, however, has a conflict. It can put reserve requirements only on U.S. charted banks and their branches. In order not to kill off or—let me put that more formally. In order not to make the U.S. international banking industry uncompetitive by imposing reserve requirements on the foreign branches of U.S. banks also, they have exempted, although I daresay they do so reluctantly and there have been discussions in the Fed how those reserve requirements could be expanded.

The Fed's intent, therefore, given these conflicting requirements, is to create as much of a possible of difference between the domestic deposits and Eurodollar deposits. It is for that reason that the Fed has always had the policy when foreign deposits are guaranteed and every and all doubt about the payability of these deposits or the responsibility for these deposits is [731] removed, that then they would impose reserve requirements also on these particular guaranteed deposits. For that reason the bankers have refused, and Mr. Howard's testimony, I think, is quite typical of that, to give guarantees for deposits. On the other hand, there are, I think, understandings among bankers about the responsibility for these deposits.

So the avoidance of a guarantee to the extent that one guarantees one's own deposit is in my view largely a matter of a game that the banks play with the Fed.

The Fed wants to have as much of worldwide dollar deposits reservable and under reserve requirements, the banks obviously for competitive reasons want to minimize these costs. And I view the rule of the Federal Reserve to exempt or to put, to put it positively, to put foreign deposits, foreign dollar deposits when they are guaranteed under reserve requirements to create a distinction, a little barrier between the onshore market, that is the domestic market, and the Eurodollar market.

[732] THE COURT: Well, does it make any sense except the technicality?

THE WITNESS: It is a pure technicality, sir. It is a technicality that reconciles the conflicting views of the Fed, on the one hand, to have as much of the dollar deposit base subject to reserve requirements and, on the other hand, not or to even foster the international competitiveness of the U.S. banks.

Therefore, in the markets that little game is being played: What is guaranteed and what is not guaranteed.

THE COURT: Well, another question, at page 648 of your testimony, beginning on line 10:

"Bankers understand, do they not, that home-office liability for branch deposits is qualified by the consideration that a bank's liability generally will be measured by the law of the jurisdiction where the foreign branch is located." And then you go on later on—I'm on the wrong page. 641.

THE WITNESS: 641, yes, sir.

THE COURT: "An IBF dollar deposited in New York by a French bank, assume a French bank makes a dollar deposit with an IBF in New York, that deposit would be subject to one less sovereign risk than a Eurodollar deposit by that French bank in London, would it not?"

* * * *

TESTIMONY OF JEAN-MARIE F. LEPICARD

* * * *

[742] Q. Okay. That allocation of this global limit in the example we're following for Citibank, you said it was allocated among the various branches and divisions of Bank of America. But was it allocated in any way, as far as dealing with Citibank is concerned, so that you could only place so many dollars of deposits with Citibank in Singapore or London or Frankfurt or anywhere else?

[743] A. So long as it was a branch of the bank, we could place the deposit anywhere.

THE COURT: You could place your whole allowance in one branch?

THE WITNESS: Yes.

Q. You could have put the whole allowance in Citibank and have it booked at its Manila branch, for example?

A. We could have, yes.

Q. Or at London or anywhere else?

A. I saw you coming. Yes, we could have.

Q. Now, how were the country limits as opposed to these treasury lines or global limits for an institution, how were the country limits set at the Bank of America?

A. The country limit is set essentially in the same manner, because the country limit is not anything else but, again, the perception of the risk that the bank is willing to have or the maximum exposure that the bank is willing to have in any given country.

And that limit is set based on the number of—you know, there are no financial statements for a country, but you have all sorts of other criteria. And you say, okay, the limit for the Philippines, to be specific, is X.

Q. Was there a committee that had to approve—

A. Sure.

[744] Q. —these country limits?

A. Sure.

Q. What was that country committee?

A. The General Loan Committee that had to approve the bank lines, which were made up of people from

basically San Francisco and Los Angeles at the time.

Q. Was the General Loan Committee very senior officials of the Bank of America in California?

A. Sure. I mean, that was the committee that would —you know, could decide up to the legal lending limit of the bank, which was at the time $400 million or something like that.

Q. Did you yourself make recommendations to that committee with respect to some of the institutions that were French banks that you were going to be extending credit to?

A. Well, the way it worked—well, I did when I was in San Francisco because, you know, being on location, I used just to go there, like come in here, and, you know, make recommendation to the committee.

When I was in Paris, France, the way it would work was that it would go through a clearing center in London. The International Division of the bank was split into four, with one region being based in London, the so-called Europe, Middle East, and Africa division.

[745] Therefore, a credit request processed out of Paris would go to London, would be viewed in London, either approved in London if it was within London's authority or it would go up to San Francisco if need be. So that's how it would work.

Q. Okay. Now, prior to 1983—and again still sticking with your employment with the Bank of America—

A. Right.

Q. —was it the practice of the Bank of America then that it did not matter at all at which branch of a major money-center bank a U.S. dollar deposit placement was booked in?

A. No.

We had the—you know, to take Citibank, we had an allocation of, say $20 million, which meant we could place up to $20 million with Citibank and/or any of its branches.

Q. Let's take an example. What if Bank of America was dealing with a French branch of a United States bank, and the Bank of America while you were there was going to place a U.S. dollar interbank deposit with that French bank and it was going to be booked at one of the French branches.

A. Hold it.

Q. Are you with me so far?

A. No.

[746] You said the Bank of America dealing with a French branch of a U.S. bank? Is that what you said?

Q. Yes.

A. Okay.

Q. Is that a hypothetical that we shouldn't use because it just doesn't happen.

A. No, it does. I mean, Bank of America Paris would make a dollar deposit with Citibank Paris for that matter, and it did.

Q. Good. That's an even better example. Let's take Bank of America Paris, and let's say Bank of America wanted to place an interbank deposit in U.S. dollars in Citibank.

A. Paris?

Q. And it was going to be booked at its Paris branch.

A. Yes.

Q. Are you with me so far?

A. Yes.

Q. Now, with the way that you dealt with country risk or sovereign risk at the Bank of America, was that deposit French or U.S. risk?

A. That was U.S. risk.

Q. Why?

A. Because it was Citibank. And Citibank is U.S.

[747] risk.

Q. Well, did you look to the country in which the home office was located or where the branch was located?

A. The home office. And that's very obvious.

Q. Always?

A. Yes.

Q. What about if Bank of America had placed a U.S. dollar deposit with an German bank that was booked at the German bank's branch office in Singapore? This is my last example.

A. Okay. German risk.

Q. You're clear of it?

A. Yes, I'm clear on that.

Q. Who in your understanding of the way practices worked at Bank of America, who did Bank of America look to for repayment of these interbank deposit obligations?

A. Well, it looked to the bank with which it was placing the deposit.

Q. Are you referring to the bank as an institution or a particular branch?

A. The bank as an institution.

Look, Bank of America Paris as a branch of Bank of America had a capitalization which was minuscule. I would assume, you know, in most instances, in branches, the capitalization is just left to the bear minimum that local [748] regulations require.

So, whenever someone was placing a deposit with us, obviously it wouldn't be looking at our own balance sheet in Paris because that had no meaning whatsoever. So they was looking at the institution.

I mean, in Paris we had a capitalization—I don't want to start with numbers—but we had total assets of around a billion dollars, with a capital of, you know, a few millions. In that year, it was enormous. And so we would look, and we looked, and the way we expected people to look at us, i.e., as a—you know, we were a money-center bank regardless of where we were operating.

Q. I'd just like to clarify something. Mr. Lepicard, we've asked you about Bank of America, and I don't want to go through the same set of questions with your experience at Credit du Nord. But was that also your understanding of how sovereign risk was determined and also who you looked to for repayment, that it was the institution and not a branch when you were at Credit du Nord?

A. It is the very same thing at Credit du Nord.

Credit du Nord has limits for every country. In the case of the Philippines, to be on that one, we had country limit of zero. Therefore, the only way our branch in New York, when it made that deposit, could have made this deposit was to do it on the U.S. basis.

[749] We were looking at banks—you know, Citibank for us is a U.S. bank and Deutsche Bank is an German bank, regardless of where the deposit is booked.

THE COURT: Did you have any deposits in Citibank Manila?

THE WITNESS: Yes.

THE COURT: And the Philippine limit was zero?

THE WITNESS: The Philippine limit was zero, yes.

Q. This is while you were at Credit du Nord?

A. Yes.

Q. Okay.

A. Well, this, I mean, was before I arrived at Credit du Nord, because I only arrived in 1984.

Q. But just so the record is clear, the deposits that Credit du Nord made with Citibank that were booked at its Manila branch in 1983 before you arrived there, Credit du Nord even in 1983 did not have any—it was a zero country limit for the Philippines in 1983; right?

A. True, yes. I mean, the Credit du Nord did not want to deal with the Philippines.

* * * *

[757] Q. Of that, how much is still outstanding?

A. A little over half of it. 7 million and change.

Q. You were repaid a portion of it at the time that approximately 46 percent was repaid to the various deposits?

A. Yes.

Like, I think we were treated like anybody else, to my knowledge.

Q. Are you familiar with the interest rate that Credit du Nord received from Citibank for the deposits in question that it placed with Citibank that happened to be booked at its Manila branch?

A. Yes.

Q. Did it receive a market rate of interest for those deposits?

A. Well, we spent considerable time trying to, you know, compare the actual rate we got with the so-called market rate, given the so-called market-rate changes—or, could change every minute, anyway.

And it was, from what we can tell, counselor, I'd say a 16th or one-eighth over what you could read on the screen, you know, at that time.

Q. 1/16 to 1/8 over the LIBOR market rate?

A. You see, LIBOR is the rate at which banks make deposits at the London market at 11 every day. But, you [758] know, two minutes after, the rate may have changed. So, it is very hard to—you know, if it is 1 percent or 2 percent over, you know there is a difference. If it is a 16th, it could be just, you know, something in the market.

Q. It could be just as the sun moves around the world and the market changes, that the rates vary slightly by a sixteenth or an 8th?

A. Well, in recent times it has varied more than that during the course of a day.

Q. Given that you say Credit du Nord received about a sixteenth to an eighth as best you can determine about the market rate, in your view did Credit du Nord receive a sovereign risk premium for taking risk in the Philippines when it placed these deposits with Citibank?

A. I think I can answer that one by saying that, you know, after we got—we started arguing with Citibank over the repayment of the deposit, and it was clear that we wouldn't get our funds immediately, Citibank agreed to pay 1⅛ over.

Q. Over market?

A. Over LIBOR rate. So there is a 1 percent difference.

So, it seems to me that at that time they indeed recognized that there was a Philippine premium because they paid it at 1⅛ over and not just an eight or a sixteenth.

[759] Q. That was after the moratorium and they refused to repay; right?

A. Oh, yes.

Q. And it is clear in your mind that before that happened, in 1983, that Credit du Nord had not received any sovereign risk premium in the interest rate that it received from Citibank on these deposits?

A. No.

Q. It is clear in your mind that you did not receive it?

A. That's why we were mad as hell because we get screwed. And not only that, we don't even get, you know, the premium.

Q. Okay. Very well put.

Mr. Lepicard, just to finish, did you bring some documents with you from Paris?

A. Yes.

Q. Did you also make these documents available in Paris to one of the Shearman & Sterling lawyers who's at the Paris branch?

A. Yes, I did.

Q. You had an interview with that lawyer on Monday?

A. Yes, I did.

Q. Okay. Let me ask you to identify for us Plaintiff's Exhibits 87, 88 and 89.

[760] A. Yes, sir.

MR. HOFFMAN: I think we have the exhibits but I don't believe we have the numbers straight.

MR. SNIDER: Let me just see if I can be of some assistance.

(Pause)

BY MR. SNIDER:

Q. Mr. Lepicard, can you identify what has been marked as Plaintiff's Exhibit 87 for identification?

A. Yes.

Q. What is it?

A. 87 is what it says it is. It is consolidated exposure, by country, of risk. This was run at our—I can say that because I've seen the original. I mean, this is not the original.

Q. Of course.

A. This was run out of the New York branch in December of 1983.

All this does is listing, you know, our outstandings, exposure, by country—Australia, Bermuda, etc.

Q. If you look at the top of the document, can you confirm that this is a computer run from December 14, 1983?

A. That's what it says, yes. I mean, I wasn't there, but I have no reason to—

[761] Q. Have you seen country exposure reports like this before—

A. Yes.

Q. —while at Credit du Nord

A. Yes.

Q. And can you look at the report and tell me whether or not there is any Philippine risk listed at all here?

A. No Philippine.

Q. What about your deposits with Citibank, where are they listed here?

A. Well, they would be under the U.S. line, United States of America line. I mean, if you look, that's where—

Q. Are they listed there? The question is not would they be there, but are they listed under United States, to your knowledge?

A. They would, yes. You know, I don't have the breakdown of what is in there.

THE COURT: But it is not there to cover it.

Q. $149 million.

A. It would be in there. It would be grouped under all the Citibank lines, and then it would be U.S. exposure.

THE COURT: But there wouldn't be any separate line for the Manila branch?

[762] THE WITNESS: No.

THE COURT: I see.

MR. SNIDER: Your Honor, I'd like to offer Plaintiff's Exhibit 87 for identification, into evidence at this time.

MR. HOFFMAN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 87 marked for identification, was received in evidence)

BY MR. SNIDER:

Q. Now, Mr. Lepicard, if you could look at Plaintiff's Exhibits 88 and 89 for identification.

88 is the one that's in French.

A. That's the telex.

Q. Telex to Credit du Nord.

A. New York.

Q. From Paris.

A. Yes.

Q. And Plaintiff's Exhibit 89 for identification is in English, a letter dated December 23, 1983, I guess it's an internal Credit du Nord memorandum.

Is that right?

A. In New York. Yes.

* * * *

[764] Q. Well, tell us what 89 says and why it was sent at this time, in December of 1983, if you know, Mr. Lepicard, to your New York branch.

A. Well, obviously what happened in the Philippines, you know, shattered our belief or at least showed on the practical basis that what we thought, you know, was no

problem, i.e., making a deposit with a branch anywhere, could become a problem.

So, you know, we figured, let's stop it. And from now on, and until this gets resolved, we only place deposits in countries where we have no, you know, problem, where we don't think there will be a repayment problem. And that's why we felt, the bank at the time, because I wasn't around, you know, felt the need to send this.

Q. This was triggered—

A. This is a change in policy.

Q. This here was a change in policy triggered by the Citibank situation?

A. Yes.

Q. What had been the policy, just so we're clear, what had been the policy of Credit du Nord before this change in policy?

A. I think we're clear. The policy had been that we could make the deposit with any branch, you know, of the—

* * * *

[766] THE COURT: Let's proceed.

BY MR. SNIDER:

Q. Mr. Lepicard, what is your understanding with respect to whether bankers still expect to be repaid and believe that there is an obligation to repay a deposit which may have been booked at a branch of a U.S. bank even if no reserves had been maintained by the U.S. bank on those deposits?

A. I'm not sure I understand the question. What reserves do you mean?

Q. I'm talking about United States reserves.

Let me just ask you this: As a banker, when you look at the obligation of the institution to repay you, do you care one way or the other whether or not the deposit-taking bank is maintaining reserves on that?

A. Oh, you mean the kind of reserves the bank would maintain with the Fed?

Q. Yes. Do you care?

A. How would I know?

[767] Q. The question is, do you care?

A. No.

But I say, how would I know if they maintain reserves or not? I mean, that's irrelevant, to me.

Q. Is it your view, however, that their obligation to repay the deposit to you is not—

THE COURT: I can answer that question.

Q. —is not conditioned—

THE COURT: Obviously that's his view. And it is true.

Another question.

MR. SNIDER: Well, this is another question.

BY MR. SNIDER:

Q. Is it your view that the obligation to repay that the institution has is not conditioned in any way on whether they've reserved or not?

A. Sure.

Q. Have you been involved in the discussions on repayment of the Philippine debt moratorium with the Steering Committee or Advisory Committee?

A. In a limited way—when you say "you," is that me personally or is that the bank?

Q. Let's start with you personally.

A. Yes, the answer is yes.

* * * *

[769] Q. Was that the same language there, to your knowledge, in 1983 when Credit du Nord placed these deposits with Citibank?

A. Well, I've looked at the documents, you know, involving the placement of the deposits between Credit dud Nord and Citibank Manila, and the confirmation slip itself from Citibank Manila says, "Pursuant to rules and regulations in effect from time to time."

Q. But they changed—

A. Whatever that means.

Q. —that legend, didn't they, after the Philippine debt moratorium?
A. Yes.
THE COURT: What's the legend say now?
THE WITNESS: Well, it is a lot longer. I couldn't, you know, tell you word for word. It says basically, you know, that it is subject to restrictions that may exist in the country, etc.

BY MR. SNIDER:

* * * *

[771] Q. Let's take a deposit with a U.S. bank which happens to be carried on the books of a foreign branch.
What is your understanding as to where the funds—
THE COURT: Is there any dispute as to this?
MR. SNIDER: I would hope not, your Honor, but the other side seems to think that there is a dispute about it.
Q. Isn't it your understanding that it is payable both in the first instance when the deposit is placed and then when it is repaid in New York, Mr. Lepicard, if it is U.S. dollars?
A. Well, in New York, or it could be elsewhere in the U.S.
Q. In this instance—
A. It has to be in the U.S. for dollars.
Q. In your particular instance, Credit du Nord's deposits were not payable in Manila, were they?
A. Well, the deposit was placed with Citibank, N.A. Manila branch, and it was payable both ways: when it was made and where it was to be repaid; in New York in their case, you know, making the deposit at the Citibank Manila and to be paid at Citibank New York, and in our case with [772] Bankers Trust.
Q. Are you personally familiar with a lawsuit filed in Paris involving Iranian assets where both Bank of America and Citibank were parties?
A. Yes.

Q. Did you yourself get involved in some aspects of that litigation?
A. Oh, yes.
Q. What was Bank of America's position with respect to the question of whether or not its Paris branch was governed by U.S. laws and jurisdiction because their home office of Bank of America was a United States institution and because it was U.S. dollars being paid and transferred in New York?
A. Well, that was the view that was defended by the Bank of America. And if I may add, by some other banks as well.
Q. What position did Citibank take in that litigation, if you know?
A. Oh, I do, because we did talk about it: exactly the same as the Bank of America.
Q. It was the same position as Bank of America?
A. We had deposits from—
MR. HOFFMAN: I could stipulate to the position that Citibank took in that litigation. I was responsible [773] for it.
THE COURT: That would be a more direct way of getting it, if it is relevant.
MR. SNIDER: I will accept the stipulation.
MR. HOFFMAN: And the stipulation, your Honor, is that because those deposits were in U.S. dollars, U.S. law applied and the transfers were through New York.
In other words, that's one of the these Eurodollar deposits like the ones described by Professor Dufey to sovereign risks.
THE COURT: If it becomes relevant, we can get the stipulation. We can get a document that they took a position, and not some person's recollection of what the position is, if it is relevant.
MR. SNIDER: Okay, your Honor.
I have no further questions.
Thank you very much, Mr. Lepicard.
THE COURT: And you'd like?

MR. HOFFMAN: I'd like to prepare a little bit, your Honor.

Would it be appropriate to start after the luncheon break?

THE COURT: Okay.

* * * *

TESTIMONY OF WILL C. WOOD

[788] Q. What about Mercedes Benz of North America, which is a subsidiary of Daimler Benz and is in Montville, New Jersey out here, would the international banking division have been involved in setting the credit limit for that subsidiary or branch that was in the United States?

A. No, it would not. It would have noted it, it would have said, "Yes, we are aware that the corporate bank is doing it because it is a domestic U.S. operation."

If we had known something to the detriment of the parent, we would have had an obligation to say so.

Q. Let's take this example. Let's take General Electric. If General Electric had a branch in Paris that was doing business in Paris, would your international banking division have been involved in recommending and setting the credit limit and then deciding whether to extend credit to General Electric in Paris?

A. No. Again, we simply would have noted it. The approval—

Q. Who had the responsibility for that?

A. The corporate banking group would have in the United States because it's a branch, as you outline it, of a U.S. company.

Q. Was that true not only of corporations, but also of other banks?

[789] A. Yes.

Q. So just to take an example, if Citibank had a branch in Paris, would the extension of credit to the branch in Paris or a deposit placement with the Citibank branch in Paris, would that have fallen under the international banking groups credit limits or would that have

been handled by the corporate banking group which dealt with companies that were headquartered in the United States?

A. The policy was very clear on what we called global money market lines, and it said that credit extensions to U.S. banks or their branches was approved by the corporate banking division. It's very explicit.

Q. When extending credit to either banking or corporate branches that we just talked about, isn't it true both during the time that you were at Citibank and while you were at Crocker that in determining an extension of credit to a foreign branch of a U.S. corporation or U.S. bank, that in both of those institutions that you were employed at it was treated as U.S. sovereign risk?

A. Yes, I believe it was. I do know that in Brazil, for example, if we had extended credit to a branch of a U.S. company, we did not include it in our Brazilian country limit.

Q. Are you talking now about when you were at [790] Citibank or at Crocker?

A. No, when I was at Citibank.

Q. You left Citibank in 1975?

A. 1975.

Q. Was that still the policy when you left Citibank in 1975?

A. Yes, it was.

Q. At Crocker, in dealing with other banks, was it generally the practice then that you looked at the sovereign risk of the country where the home office was located?

A. If you are talking about a branch, yes.

Q. Talking about branches and not subsidiaries?

A. Yes, talking about branches, yes.

Q. Under Crocker's policies, then, if there were an interbank U.S. dollar deposit placement that your London branch that was part of your international banking division, Crocker's London branch placed it with a Paris

branch of a U.S. bank, would that have been French or U.S. sovereign risk?

A. It would have been U.S.

Q. Why?

A. Because it's a branch of a U.S. bank and the policy said that the domestic people approved it.

* * * *

[791] Q. And Crocker met those obligations?

A. Yes, it did.

Q. Where did you learn your procedures and policies —strike that.

Let me show you an exhibit, Mr. Wood, which we have marked for identification as Exhibit 90.

(Handing to the witness)

(Pause)

MR. SNIDER: Let me identify it for the record.

Exhibit 90, which we provided to counsel for the first time last evening, I must also tell the Court this was provided to me by Mr. Wood for the first time last evening, for the record is some credit guidelines for money market transactions from the manual of the Crocker National Bank.

This is dated May 1978, and what we have are exhibits from that manual.

Q. Can you identify this, Mr. Wood, as a document that you provided to me last evening?

[792] A. Yes.

THE COURT: And what he said about it is true?

THE WITNESS: That's correct.

Q. It is from the manual that was then in effect when you left Crocker in 1986 and went over to Wells Fargo, is that right?

A. Yes.

THE COURT: He didn't go to Wells Fargo, he was carried over to Wells Fargo.

MR. SNIDER: Okay.

THE WITNESS: They took me.

Q. Was this, to the best of your knowledge, was this the then in effect policy of Crocker National Bank involving global money market transactions and credit limits and country limits at the time that you left Crocker National Bank?

A. Yes.

Q. You have to answer.

A. Yes.

THE COURT: He said yes. I could hear it.

MR. SNIDER: I didn't hear it.

Q. Did you have a hand in writing any part of this policy?

A. Yes.

Q. Were there any others at Crocker involved with [793] you in writing this policy?

A. Yes. I'm not the author. I'm a contributor.

Q. Who were the other contributors or authors?

A. The author I guess who takes the credit for it is a woman named Barbara Otto, and she had the collaboration of a lot of people in the bank.

THE COURT: Including you?

THE WITNESS: Including myself.

Q. Where was Barbara Otto formerly employed, if you know?

A. Citibank.

Q. Did Mr. Stockholm have any hand in contributing to the development of this policy at Crocker?

A. He is one of the co-signers, as you can see from the exhibit. I don't know if he had a role in actually contributing or not.

Q. You are referring to the first page of what is Exhibit C, which is in the middle of the packet?

A. Yes.

Q. Where was Mr. Stockholm formerly employed?

A. Citibank.

Q. Were there any other Citibank employees who had a hand in the writing and formulation of this policy?

A. Yes. I know that Dick Byrd, who was the senior credit officer of the international banking group, also [794] contributed to this, and he was employed by Citibank prior to joining Crocker, also.

Q. Isn't it correct that the credit approval guidelines and policies for country limits and for extensions of credit to banks and other corporations that are set forth in Crocker's policy were basically borrowed or copied, if you will, by several of you who came over from Citibank, but it was taken from procedures that were in effect at Citibank?

A. I think that it is probably better to say that we could recollect the best. None of us copied anything, but we tried to implement the credit policies where a complete vacuum existed based on the best of our recollections of sensible policies.

Q. At Citibank, did the credit approval process that you have just described for Crocker and how it was divided up, did that proceed along the same lines at Citibank as you have described for Crocker?

A. When I was there it did.

Q. Let us take as an example, let's take the example of an extension of credit to the Paris branch of General Electric which we talked about for Crocker.

How would that have been or how was it treated and approved in terms of Citibank's operations while you were there?

[795] A. I can't talk about Paris, if you can make it Brazil, then I can tell you what we would have done.

Q. You were in Latin America?

A. Yes.

Q. How about Rio de Janeiro?

A. We would have recommended it, I guess, if we wanted to do the business or conceivably New York could have told us that they wanted to do the business, we would have recommended it for their approval, they would have approved it, whether it be a cruzeiro obligation or a dollar obligations or anything else, it would not have

been included under Citibank's Brazilian country limit at the time.

Q. Which country would it have been included under?

A. If it was General Electric, I guess—I don't think they have country limits for the United States. It would have been no country limit.

Q. But it would have been treated as United States risk?

A. I guess if that's what they call it. I don't think they had a limit for the U.S.

Q. And was the policy at Citibank essentially the same as set forth in Crocker's policy when dealing with a foreign branch of a United States bank instead of corporation?

[796] A. Say the question again.

Q. Was the policy at Citibank the same, the credit approval process and the policy essentially the same as is set forth in Exhibit 90 when dealing with a foreign branch of a U.S. bank?

A. Right, yes, right.

Q. Isn't it a fact, Mr. Wood, that you and Dick Byrd had thought about changing Crocker's policies in 1983 so that in short Crocker would have also evaluated not only the risk where the home office of the other bank was located, but you would have taken into account to some extent the country where the branch was located?

A. Yes. Before 1983, in 1982, when the Mexico thing happened, we started to get worried about it.

Q. You didn't implement the policy, any change in the policy in 1982, did you?

A. No, no, we didn't.

Q. Isn't it a fact that you did not change that policy in any respect until after the Citibank situation in the Philippines arose?

A. That's correct.

Q. And your changing of the policy at that time, after the Philippine moratorium and Citibank's default was

triggered by Citibank's reaction to that moratorium, wasn't it?

[797] A. That's what got us off our duff, so to speak, and made us do it, yes.

Q. To your understanding, Mr. Wood, as an experienced banker who has been in the business now for some 20 years that the practice at most of the banks that you are familiar with is when dealing with interbank deposits, that it was treated as being subject to the country risk where the home office was located and not where the branch was located?

A. Yes.

Q. First of all, did Crocker have any interbank deposits placed with Citibank and booked at its Manila branch?

A. No.

Q. Let's take the deposits in this case. With respect to a deposit that was placed with Citibank and then booked at its Manila branch, an interbank deposit in U.S. dollars, as you understand the policies and practices of Crocker, would that have been treated as U.S. or Philippine risk?

A. U.S.

Q. You don't have any doubt about that, do you?

A. No.

Q. Would it have come out of the Philippine country limit?

[798] A. No, it would not.

Q. Would it even have come to you for approval if it was going to be booked at a Manila branch of Citibank?

A. I would not have seen it. I would have seen it because I was a member of the credit policy committee and I knew what Crocker's exposure to Citibank was, but I wouldn't have known where it might have been allocated.

Q. In your capacity, though, as executive vice president in charge of international banking division, you

would not even have known about it or had to approve an extension of credit to Citibank when it was booked at its Manila branch, is that your testimony?

A. I would not have to approve it. I could have conceivably have known about it.

Q. What is your general understanding based on your experience in the banking industry as to whether it is the home office of a bank or the branch that depositors look to for repayment?

A. They look to the bank.

Q. Why?

A. I guess their feeling is that if they were going to look at it differently, if they were going to look at it as a local risk, they would get a premium, they would get something that reflects the risk.

* * * *

[804] Q. Do you know whether Citibank in its London branch books billions of dollars of interbank deposits virtually every day during the workweek?

A. I got to believe that they do.

Q. What do you base that on?

A. The size of the bank, what they did when I was there, their activities. They got to.

Q. What about Citibank's Nassau branch, isn't it the fact that Citibank's Nassau branch books hundreds of millions of dollars in interbank deposits every day?

A. It certainly did when I was with the bank. I have no reason to believe that that's changed.

Q. In your view, do the depositors who are placing interbank deposits with Citibank in London and Nassau, do they regard that as United Kingdom or Nassau risk or do they regard that as U.S. risk?

A. I believe they regard it as U.S. Citibank risk.

Q. Why do you believe that?

A. I can't conceive of their placing all that money at those kinds of market rates if they didn't believe it. That's all. In the U. K., you know, the regulators don't require any capital.

THE COURT: Don't require any what?

THE WITNESS: They don't require any capital for [805] foreign bank branches. So it is a balance sheet that's completely debt.

I just find it difficult to believe that anybody is going to place as much money as I've got to presume they place with any foreign branch of any branch operating in London if they don't understand that they're doing it with the bank. Foreign bank branches in London don't have capital.

Q. Well, what about the situation in the Philippines? Do you believe that the banks who were placing deposits with Citibank that were booked at its Manila branch, were those sophisticated banks?

A. "Sophisticated" is a misleading term. I'm not so sure I understand what that means.

Q. Well, you have been at Wells Fargo now for a while. You heard Mr. Lepicard this morning from Credit du Nord and some of the other banks.

How do you account for the fact that all of these other banks had placed such large deposits with Citibank and had them booked at its Manila branch in 1983 when this Philippine moratorium was imposed?

A. I've got to presume that they had some funding requirements in Asia for those time zones and that they were placed with Citibank because they were satisfied with Citibank risk.

[806] Q. Well, Philippine risk or U.S. risk?

A. Citibank U.S. risk. I don't understand, since I understand there were no premiums paid for Philippine risk, there can't be any other reason for doing it.

MR. HOFFMAN: Objection; move to strike the answer, your Honor.

MR. SNIDER: That was my next question, your Honor.

THE COURT: What's your next question?

MR. SNIDER: My next question was—I was going to ask him whether the conclusion he just drew was based in any way on what his understanding of the rates being paid on interbank deposits were.

And he has already given the answer. It is in the record.

THE COURT: I'll allow the answer to stand.

MR. SNIDER: I'm sorry, you allowed the answer to stand?

THE COURT: Yes.

MR. SNIDER: Thank you, your Honor.

BY MR. SNIDER:

Q. Now, this different view that Citibank had that you testified to, Mr. Wood, where they look not only at the sovereign risk of the country where the home office was located but for some purposes they also looked at the [807] country where a branch was located—while you were there, did they provide that information as a matter of general circulation to the depositors they were doing business with?

A. Not that I'm aware of, no.

Q. Why, in your view, Mr. Wood, would Citibank have this policy about taking into account the sovereign risk of the country where the branch was located in dealing in this massive interbank deposit market and not inform its depositors of that?

MR. HOFFMAN: Objection; assumes a fact not in evidence, your Honor.

The witness has testified on his understanding.

THE COURT: Well, there is no evidence at all that any depositor was informed, except occasionally by letter. No evidence of the fact that the depositors were informed. I think we can assume that they weren't, unless it is proven to the contrary.

A. I was not involved in voluntarily advising any customer of that.

I do recall one case when I was a trainee, when somebody asked and there was a very carefully worded letter that we sent them which said yes and no, in effect.

Q. But why did Citibank not make it a practice—

[808] THE COURT: I don't know if he is the appropriate witness to answer that question.

I take it you never attended a board of directors meeting?

THE WITNESS: No.

Q. Let me ask you this: From your experience in the banking industry, given that Citibank was taking deposits at these branches all over the world, was it in Citibank's interest to inform the depositors of its position on the country and sovereign risk question where the branches were located?

A. Probably not.

Q. Why not?

A. Because then the customer would have demanded a different rate and Citibank's cost of funds would have gone up.

Q. Do you know of any instance, Mr. Wood, where any bank in the world has ever refused to repay a depositor with the assets of the banking institution as a whole on the basis that the obligation was one that belonged to the branch in the event of a debt moratorium?

A. This one.

Q. This case here?

A. Yes.

Q. Do you know of any other—

[809] A. No.

Q. —instance like this?

A. No, I don't. No, I'm not aware of any other.

Q. Now, did Crocker Bank have any interbank deposits with Citibank—not at Manila but just interbank deposits that were placed with Citibank?

A. I don't recall. I'm sure we did. I'm sure we did.

Q. Once Crocker placed an interbank deposit with Citibank, did Crocker care where that asset or that deposit was booked in terms of the foreign branches, that is, prior to 1983?

A. It only would have happened in London. So anything beyond that is really very hypothetical.

And the answer to the question is no.

We didn't run a 24-hour book; we had a book in London and we had a book in San Francisco and that was it.

Q. In your view, do bankers believe, and do you believe, that the obligation of a bank to repay a U.S. dollar interbank deposit has anything at all to do with whether the deposit-taking branch has provided reserves for it?

A. No.

Q. In a U.S. dollar interbank deposit booked at an offshore branch, Mr. Wood, in your view as a bank banker, [810] what do bankers generally understand that those deposits were paid in the first instance, and then repaid at maturity?

A. I think the deposit probably actually takes place through a transfer in New York. I mean, ultimately that's where the money moves. All these markets, the trasactions took place in New York. The deposit takes place in New York and the settlement takes place in New York, unless for some reason they say San Francisco or Chicago or something like that.

Q. Isn't that the practice—

A. Yes.

Q. —involving U.S. dollar interbank deposits?

A. Yes.

Q. It is paid and repaid in the United States?

A. Yes, I believe so.

MR. SNIDER: Thank you, your Honor.

I have no further questions of the witness at this time.

THE COURT: Do we have that letter that was written—

MR. HOFFMAN: I think your Honor may be referring to Defendant's Exhibit I.

THE COURT: I guess so.

* * * *

TESTIMONY OF RAFAEL B. BUENAVENTURA

* * * *

[828] MR. McAMIS: June 1983, your Honor.

MR. FISCHLER: That's the time frame I've been talking about, yes.

THE COURT: Did they change afterwards?

THE WITNESS: I believe we have.

THE COURT: What was the change?

Have we got a copy of the new one?

MR. FISCHLER: I don't believe they've been designated as an exhibit by either party, your Honor. I know we did not.

THE COURT: It would seem to me to have some relevance.

MR. FISCHLER: Well, your Honor, we don't think it does. I'm happy to explain why.

I can have this witness tell you what he knows about the change, I'll be happy to do that.

THE COURT: Well, I mean, I'll just tell you why I believe it is relevant, although it may not be.

It always occurs to me that if Citibank had this rule that has been developed, it would have been perfectly simple to put it on its deposit slips way back in the beginning, and I'm just wondering why they didn't.

BY MR. FISCHLER:

[829] Q. Do you have an understanding of why they didn't, Mr. Buenaventura?

A. We had a—

THE COURT: I mean, you've been listening to the tesimony.

THE WITNESS: Yes.

THE COURT: And it seems that everybody, except Citibank, assumed that the Manila branch was just like Citibank. You assumed something different.

THE WITNESS: Yes.

THE COURT: And apparently you knew everybody else assumed different from you, at least according to the last witness.

THE WITNESS: Yes.

THE COURT: Why didn't you put on your deposit slips, Mr. Buenaventura, what you assumed so that everybody would know? That's what's troubling me.

MR. FISCHLER: Just so the witness understands, your Honor, are you asking why there was something not on the deposit slips which said subject to—

THE COURT: This last witness I thought was quite illuminating that way. Way back when he was a trainee, Citibank had a different view of this problem than anybody else had, a perfectly legitimate view. And Citibank must have known that everybody had a different [830] view.

Why didn't they put on their deposit slips something that would alert a depositor to the fact that they had a different view from everybody else?

MR. FISCHLER: Your Honor, as a preliminary matter, I would think that we do not accept this witness's characterization—I mean, the previous witness's characterization of what Citibank's views were.

THE COURT: Well, you didn't cross-examine him on it. And certainly it is consistent with everything else that I have heard so far.

BY MR. FISCHLER:

Q. Mr. Buenaventura, do you have an understanding why in June of 1983, if Citibank did not have a legend on its confirmation—Citibank Manila did not have a legend on its confirmation slips that said, in sum or substance, that deposit placements with Citibank Manila are

subject to the sovereign risk of the Philippines, why that was?

A. Yes.

We had a different format, your Honor, at that time, as part of the confirmation slips.

THE COURT: Well, do you agree with what the other witnessed just said?

THE WITNESS: No.

[831] THE COURT: I mean, apparently I'm going to learn—and why I haven't learned up to now, I don't know—what Bank of America's view was, judging by what they did.

THE WITNESS: No, I don't agree, your Honor.

THE COURT: Well, in fact, do you know whether Bank of America paid its deposits?

THE WITNESS: I was told that it was not paid during the freeze, and I was also told that subsequently it was paid out of the bank's non-Philippine assets, but I have no way of confirming that.

THE COURT: Why you people don't know the answer to that question, I'll never understand.

But it was paid?

THE WITNESS: I was told, your Honor, that they did not pay it during the freeze. They paid it after they got the approval, the same way I got my approval.

THE COURT: Well, then why didn't you pay it?

THE WITNESS: Well, your Honor, in my case, we paid. But we had more liabilities than non-Philippine assets.

My understanding in their case was that they had enough non-Philippine assets—this is Bank of America Manila—

THE COURT: The Manila branch?

[832] THE WITNESS: Yes.

THE COURT: Had more liabilities than non-Philippine assets?

THE WITNESS: That's correct, your Honor.

THE COURT: I see. So they would have had to have gone outside the branch?

THE WITNESS: That's correct.

THE COURT: And you understanding is that Bank of America had non-Philippine assets within the branch?

THE WITNESS: That's correct.

THE COURT: Adequate to pay?

THE WITNESS: Yes.

THE COURT: I see.

THE WITNESS: But—

THE COURT: You don't know that, though?

THE WITNESS: That's correct, your Honor. This is what I was told.

THE COURT: Well, somebody will find out.

Let's proceed.

BY MR. FISCHLER:

Q. Just to give that answer a bit more context, Mr. Buenaventura, do you have an understanding of the timing of any payments that Bank of America might have made out of non-Philippine assets?

And I'm trying to tie this to the Central Bank [833] giving permission in March of 1984 that those assets were—could be used by banks in the Philippines to repay Eurodollar deposits.

A. Well, I was told that the they kind of waited for our approval. In other words, they did not—they knew that we had an issue with the Central Bank in this particular case.

In other words, we were seeking, actively seeking for permission. Since they knew we were doing it, they decided they might as well wait. If we get approval—

THE COURT: Are you talking about "they," Bank of America?

THE WITNESS: Yes, your Honor.

A. (Continuing) And my understanding is that they figured that if I would subsequently get the approval, then their letter would just be automatic.

I was told, your Honor, that after I received my letter, they also simultaneously sent their letter and got the approval, at which time they paid.

THE COURT: And the reason they were able to make the payment and you didn't feel you were able to make the payment, was that your local assets weren't adequate—your non-Philippine assets weren't adequate to pay?

THE WITNESS: Yes. It represented 47 percent.

[834] Q. And Bank of America's were adequate to pay 100 percent of theirs?

A. That's correct.

THE COURT: Okay.

MR. FISCHLER: Your Honor, I have been informed that Mr. Bellanger—

THE COURT: I saw somebody coming in.

MR. FISCHLER: I have been informed that he is here, and I believe we said we would break at this time and have him testify. I'm happy to do that, your Honor, if that suits you.

THE COURT: You don't mind being interrupted, do you?

THE WITNESS: No, I don't mind.

THE COURT: It would be interesting if I could see one of the present confirmations to see what it says.

(Witness temporarily excused)

TESTIMONY OF SERGE BELLANGER

[835] SERGE BELLANGERZ, called as a witness by the defendant, having first been duly sworn was examined and testified as follows:

THE COURT: Although you are actually talking to me, I can hear you perfectly well if you talk in that direction, whereas if you talk to me here they don't hear you, so talk to them.

DIRECT EXAMINATION

BY MS. FREEMAN:

Q. Mr. Bellanger, would you state your address, please.

A. I can't hear.

Q. Your address, please?

A. My address is 860 United Nations Plaza, New York.

Q. And what is your present employment, Mr. Bellanger?

A. I am the head of a French bank in New York called CIC Union European International.

Q. Is that the full name of the bank?

A. Well, the bank is known under the name of CIC Group.

Q. And what is your title, please?

A. My title is executive vice president and general manager.

Q. And what is CIC, Mr. Bellanger?

[836] A. CIC is one of the leading French banks which rank number fourth in France and roughly ranking 74th worldwide.

THE COURT: That is in assets?

THE WITNESS: Total assets.

Q. What are your duties and responsibilities at CIC?

A. I'm in charge of the New York branch and, as such, being responsible to run the operation and to implement policy of head office operations.

Q. Will you state your educational background, please?

A. I have a MBA, a French MBA.

Q. And from where, sir?

A. Paris business school.

Q. Would you describe for us your employment experience, please?

A. I started 20 years ago with a bank subsidiary that I am with the bank I am with today.

Q. Where was that, Mr. Bellanger?

A. It was in France, a local city called Blois.

Q. So at that time you were not in New York, you were in the local part?

A. I was in France, correct.

Q. And how long were you there?

A. I were there from 1960 to 1965.

[837] Q. What were your duties at that time?

A. At that time I was a young trainee, executive trainee in banking.

Q. And what did you do next?

A. I was employed by Citibank in Paris.

Q. What were your duties there?

A. I was assistant manager of the branch in Paris.

Q. And what was this time frame?

A. Time frame was between 1965 and 1970.

Q. What did you do as assistant manager of Citibank in Paris?

A. I was responsible for corporate banking group in the branch.

Q. In Paris?

A. In Paris.

Q. And what happened next? What was your next employment?

A. I transferred to New York, to Citibank in New York from 1970 through 1973.

Q. And what were your duties with Citibank in New York?

A. I had various duties. I was transferred in the domestic corporate banking group in New York, then I transferred to a new group called the world corporate banking group—

[838] THE COURT: World?

THE WITNESS: Corporate banking group.

THE COURT: Worldwide.

Q. And when did you leave Citibank in New York?

A. I left Citibank I guess July 1973.

Q. And have you been at CIC in New York ever since then?

A. Yes.

Q. Are you a member of any business or professional societies, Mr. Bellanger?

A. Yes. I'm currently the president of the French Chamber of Commerce.

I am director of NYFE, New York Futures Exchange, which is a subsidiary of the New York Stock Exchange.

I am a director of FINEX, which is a subsidiary of the New York Cotton Exchange.

I am the former chairman of the Institute of Foreign Bankers in the U.S.

Q. What is the Foreign Bankers Institute? Is it an association, Mr. Bellanger?

A. The Institute of Foreign Bankers is the equivalent of American Banking Association. It's a trade association which objects is to define the interests of foreign banks operating in this country.

Q. In that capacity, have you had an opportunity to [839] discuss with other foreign banks what their views are of the international banking?

A. Yes.

Q. Particularly, interbank placements?

A. Well, while I was chairman of the institute in 1978, when International Banking Act of 1978 has been implemented, and in that capacity I have been the spokesman for all foreign banks in this country testifying before the Congress and negotiating regulations with the banking regulator authorities.

Q. When you say you were testifying before the Congress, that is the United States Congress?

A. Yes.

THE COURT: What was the act you are talking about?

THE WITNESS: International Banking Act of 1978.

THE COURT: That is a United States act?

THE WITNESS: Yes.

Q. Have you written any articles or been involved with any publications in the field of international banking?

A. Yes. I'm a member of the Journal of Banking, The World Banking Magazine published by the Bank Administration Institute.

* * * *

[845] Q. That was in the 1950s, approximately?

A. Maybe 1955, 1957, 1958, whatever, but at the beginning of the market.

Q. Are you familiar with the policies of CIC regarding interbank placements, Mr. Bellanger?

A. Yes.

Q. Were these policies the same in 1983 as they are today?

A. Yes.

Q. Would you describe for us, please, those policies?

A. Well, the policy at CIC, what I mean by the policy, that the loan guidelines issued by the credit committee—

THE COURT: The guidelines, you say?

THE WITNESS: The guidelines, yes.

A. —issued by the credit committee at head office which specifically said that those limits are based on the analysis of two elements.

Q. And could you describe those two elements for us, please?

A. One is credit risk, and by that we mean [846] assessing the financial strength, the reputation, the profitability of the bank we want to extend a line to, credit risk.

Number two, the so-called concept of sovereign risk or political risk, which mean that we also look at the countries where the bank is located.

Q. And when you say look at them, what does that mean?

A. We try to assess any political risk we can have by making a deposit in this country, which means any action taken by the local government in order to prevent some claims being repaid out of the country.

For example, freeze on the assets, exchange controls or any limitations decided by the government in order to help the local economies which might have an impact on the so-called nonresident.

Q. So the issuance by a foreign government of a moratorium or a freeze on assets is considered part of sovereign risk or an example of sovereign risk, is it not?

A. Correct.

Q. Were these policies, the assessment of these two factors, one credit risk and two sovereign risk, were these policies consistently followed in your experience at CIC?

A. Yes.

Q. In your experience, is it your understanding [847] that other banks in the market employed similar policies assessing these two factors, one being credit risks and two being sovereign risk?

A. Yes, it is my understanding that discussing with international bankers or foreign bankers in this country or American bankers abroad that those two elements are an integral part of any policy framework for banks who are involved in international banking, including Eurocurrency placements.

Q. Would you describe in greater detail how CIC evaluates sovereign risk?

A. Well, CIC evaluates foreign risk by analyzing the local economy, by looking at the outlook of the economy, by looking at the political stability of the country. It might look also at the financial strength of the banking system in the country by using local stuff in the country or any specialized firm or other banks to provide us some information.

Q. In connection with sovereign risk, are there certain countries in which CIC is not authorized to place deposits?

A. Yes.

Q. And if CIC is not authorized or CIC traders are not authorized to place deposits in those countries, it could not do so, is that correct?

[848] A. Correct.

Q. And is this because certain sovereigns are considered riskier than others?

A. Yes.

Q. As part of your sovereign risk policies, does CIC establish what is known as country limits?

A. Correct.

Q. And would you explain what those are, please?

A. Country limit will be equal to the total of all bank lines extended to local banks in this country and branches of foreign banks operating in this country. The total of those lines should not exceed what we call the local ceiling in terms of country risk.

Q. When CIC in New York makes an interbank placement with a foreign branch of a U.S. bank, how does CIC New York evaluate sovereign risk?

A. CIC New York participates in the evaluation of the country risk, but this sovereign risk is decided, analyzed by head office and head office approve all bank lines to other banking institutions worldwide and communicates those bank lines to each center, which mean each branch, overseas.

Q. When CIC New York makes an interbank placement with a foreign branch of a U.S. bank, where is the sovereign risk?

[849] A. Can you repeat your question? I'm sorry.

Q. Yes.

When CIC New York makes an interbank placement with a foreign branch of a U.S. bank, where is the sovereign risk?

A. In the country where the money is deposited.

Q. So, for example, if CIC New York makes an interbank placement with Citibank Manila, where is the sovereign risk?

A. Philippines.

Q. If CIC New York wanted to obtain U.S. sovereign risk and not, for example, Philippine sovereign risk or the sovereign risk that attends the country where the placement is, is there anything that CIC can do?

A. Again, I'm sorry, I didn't hear.

Q. Is there anything that CIC, any procedure that CIC New York could take to assure itself of U.S. sovereign risk when it places money with foreign branches of U.S. banks?

A. Well, when we giving instructions or when we are providing our lines to our treasuries, we are giving them the lines per bank under two listing; one per country and another one per bank in such a way there is crisscross control there.

For example, if we have a line for Citibank in [850] three countries under U.S. parent bank, we will have Citibank London, Citibank Geneva, Citibank Milan, total global line for Citibank in the case we lending Citibank in three countries, and also under country Italy you will find Citibank Milan.

Q. In the instance where CIC New York makes a placement with Citibank Milan, that would be Italian sovereign risk, would it not?

A. Correct.

Q. If CIC New York wanted not Italian risk but U.S. sovereign risk, is there anything that CIC New York could do, could get from, for example, from Citibank to assure itself of U.S. risk?

MR. SNIDER: I am going to object to it as a hypothetical. Let's find out what they did do.

THE COURT: First find out what they could do and then find out what they did do.

Q. In other words, could they get a guarantee to insure sovereign risk?

A. Probably theoretically you are right.

THE COURT: What?

THE WITNESS: Theoretically, you are right, we will ask a bank for a guarantee.

THE COURT: But in practice you didn't do it?

THE WITNESS: The practice is, you know, the [851] markets don't work this way, because, you know, if there is, for example, Citibank Milan who want to borrow from New York market, if CIC is contacted

through a broker, we don't have any time to say, okay, we say no and probably you have two banks ready to go and to make a deposit to Citibank Milan.

So theoretically you are right, we can try to get the deal at CIC and ask for the guarantee of Citibank New York, but practically those deals are so quick that the broker will find another bank to lend to Citibank Milan.

Q. But without such a guarantee, the sovereign risk remains in the country of the foreign branch, does it not?

A. Correct.

* * * *

[862] BY MS. FREEMAN:

Q. In dealing with sovereign risk, does it make any difference if a local government flatly prohibits payment or if a local government prohibits payment with local assets?

A. Well, when CIC is making a deposit with a foreign branch of U.S. bank, we understand that the CIC is assuming the sovereign risk which, again, can be reflected by many actions taken by the local government which can be, again, a freeze, foreign exchange control regulations or any actions permitting the transfer of the deposit back to the depositor.

Q. So regardless of whether a local government moratorium is described or articulated as a freeze payment or a prohibition of payment with local assets, it means the same thing to you?

A. Yes.

Q. And in either case, would you look to the head office of the bank to be repaid?

A. Well, again, our policy clearly indicate, again, the sovereign risk is assumed by CIC lending money to the foreign branch and probably it will be viewed as such.

Q. So you would not look—excuse me—you would not look—

A. But on the other side, if the branch we put our [863] money with was going bankrupt, there at that time

we probably we recourse, again, the head office of the bank.

Q. The situation of bankruptcy is a matter of credit risk, thought, isn't it?

A. Correct.

Q. And not a matter of sovereign risk?

A. Correct.

Q. And in the instances of sovereign risk or sovereign decrees, you wouldn't go back to the head office or look to the head office to be repaid in those circumstances?

A. No.

Q. Why won't you look to the head office to be repaid in the sovereign risk situation?

A. Well, we might, we might go to the head office to ask them whether they would like us—if they would like to repay us, but it is nonlegal action, in other words, nothing can permit a bank to repay the obligation outside, you know, the law and regulations as a friendly agreement.

Q. So even though you might make a request to be repaid from a head office in the circumstances of sovereign risk and you might even get mad if your request wasn't followed, you wouldn't expected to be repaid?

A. Probably not.

Q. In terms of interest rates, would you expect the [864] interest rate from Citibank Manila to be higher or lower than, let's say, Citibank New York?

A. Well, in term of interest rate, theoretically the interest differential between a deposit in New York and any offshore center represent the cost of the reserve requirements—

Q. Those are the Fed—

A. —represent the cost of statutory reserve requirements as well as the FDIC insurance coverage for domestic deposits.

Q. And the reserve requirements you refer to are the Federal Reserve requirements of the United States?

A. Yes, yes.

This represent briefly between 20 basis point and 24, 25; between 18 and 24 basis point.

Q. Would you expect the interest rate from, let's say, Citibank Manila to be higher or lower or different from, let's say, Citibank London?

A. May I come back to what I said a few minutes ago about interest rate differential?

Q. Certainly.

A. That the theoretical explanation of the interest rate on an onshore center versus the interest rate of an offshore center, practically that is nothing different, and I can give you an example as of today.

[865] Morgan Guaranty was quoting 6¼ for 90 day term Fed funds, term Fed funds, which is a term domestic deposit, out of Nassau they were offering 6 3/16, so you can see in that case, that's right this morning, that the difference is 1/16. 1/16 of a point represent six basis point.

Q. And that's the difference between where and where?

A. Between Nassau and New York.

So just to tell you that theoretically you are right, the interest differential represent the cost of reserve requirements and of FDIC, practically it can be lower because of supply and demand of the market and the credit standing of the banks.

[866] BY MS. FREEMAN:

Q. Now, rather than compare onshore versus offshore interest rates, if we look to interest rates between various offshore centers, would you expect those interest rates to vary?

A. Well again, the first answer is yes, theoretically everybody believes that the risk of Cayman Islands is bigger than New York or that Singapore may be bigger than New York.

Practically again, as the sovereign risk concept exists, it is not reflected in the interest rates. If you take the

interest rates both for the Cayman Islands, London, Tokyo, Singapore, Germany, you might have a slight interest differential, but really the market is not reflecting the cost of the sovereign risk.

Q. But that doesn't—

A. Which still exists.

Q. But that doesn't mean that the sovereign risk has disappeared now, does it?

A. That's correct.

Q. And what is the reason perhaps that interest rates between these, among these different offshore centers may be similar or very close to each other, even though there is a sovereign risk attached to those places?

A. I think it is the market practices and probably [867] the banks as the time goes by seems maybe to forget about the cost of this foreign risk and that, you know, focusing on the name of the bank, assuming that the bank is indeed responsible.

Theoretically, theoretically, sovereign risk still applies.

Q. So even though the bankers from time to time may forget about the sovereign risk, it still exists, doesn't it?

A. Correct.

Q. I'd like to ask you if you're familiar with the term IBF.

A. Yes.

Q. And could you explain that for us, please?

A. Yes.

Well, the IBF, the so-called International Banking Facility, is viewed as the offshore center of New York.

So I will add that some other states in this country are so open, so-called IBF, and that IBF is summarizing some international banking transactions. It is not a full-fledged offshore center, which means by that that the Federal Reserve Board in order to avoid leakage decided to start international banking facilities and to restrict the operations allowed by international banking [868] facilities/SEULTSZ.

Q. Now, where is the sovereign risk regarding international banking facilities?

A. The sovereign risk for IBF is the U.S.

Q. Now, Mr. Bellanger, have you had an opportunity to explain or articulate your views regarding sovereign risk in any of your numerous writings?

A. No.

The only two I wrote, which were very close to the sovereign risk, in addition to the general international banking papers I might have written, probably is one of the IBF which I wrote before the IBF was open in 1983, I guess, plus another article on the IBF which I wrote jointly with an economist of the Federal Reserve Board.

Q. Who was that economist of the Federal Reserve Board?

A. Pardon me?

Q. Who was that?

A. Mrs. Key.

Q. Now, I'd like to turn back to our example again that we were working with before, that is, CIC New York placement with Citibank Manila.

A. Yes.

Q. Who are the parties to that contract?

[869] A. Well, the parties of this contract—No. 1, you have to understand that Euro currency transactions involve two groups of individuals. One are the people who are trading on the markets directly or through a broker and those individuals are the traders. So the staff of the two banks were in the treasury group. Those individuals, as I explained before, are authorized by the bank and the branch to commit the bank for a certain amount, to borrow or to lend.

There was another group of individuals in this process and those individuals in both banks are responsible for what we call the settlement of the transaction. And those two individuals are in the banks in the U.S., responsible for the so-called carrying account maintained by the banks in the U.S. in order to clear the transaction.

And I will add that this second group of individuals can only move funds from bank to bank through the system's open instructions of the banks who are parties to the action, which means the traders in the branch or in the country and the other banks who is making a deposit to Citibank Manila.

Q. Just to make sure I understood you, so without instructions from, let's say, CIC or Citibank Manila, the transaction would not go forward.

A. Of course.

[870] Q. Now, taking your example, a CIC New York makes a placement with Citibank Manila, who are the banking parties to the transaction?

A. What do you mean by the "banking parties"?

Q. Between whom and whom is the contract of the transaction?

A. I'm telling you—

MR. SNIDER: I'm going to object, your Honor. That calls for a legal conclusion at this point.

MS. FREEMAN: I'm just trying to get his understanding.

THE COURT: I'll take his understanding of it.

A. The so-called banking parties are the two traders, the traders in CIC who want to place a deposit with Citibank Manila and of course either the broker and the trader in Citibank Manila who will accept the deal. Those are the two who are responsible for putting that transaction on the book.

Q. Which entities are involved in this process? I'm not talking about the people involved but the entities. When we're looking at CIC New York, do we look at CIC generally or do we look at CIC in New York?

A. The people who are parties of the branch of Citibank in the case you mentioned and Wells Fargo Asia, I understand, for example, on the other side.

[871] Q. Okay. So in a situation where, let's say—

A. Not the head office.

Q. So head office is not involved—
A. No.
Q. —as a party to that contract?
A. No.

MR. SNIDER: I'm going to move to strike that as a legal conclusion.

THE COURT: Your witnesses said the opposite thing. Nobody moved to strike it.

MR. SNIDER: He hasn't even seen the confirmations or any of the other exhibits.

THE COURT: Nobody moved to strike what your witnesses said.

Let's proceed.

BY MS. FREEMAN:

Q. Now, is the Philippines presently on CIC's list of authorized countries—
A. No.
Q. —that is, where CIC could make an interbank deposit?
A. No.
Q. And was it authorized or an authorized sovereign in 1983?
A. In 1983, no.

[872] Q. Now, are your views that you have just gone over with us this afternoon regarding Eurodollars and sovereign risks, shared by other bankers?

A. As I mentioned before, I think that in my discussion with international bankers, the sovereign risk concept is very well understood by many, many banks who have been involved in international banking for many, many years.

And also I think it is very well understood by a lot of corporations who are also involved in this type of transactions, sovereign risk being the action taken by country: One, you have a transaction whereby one of the parties is on both sides of the border.

I believe that as the time passes by, the tendency, when there is no "accident," on that issue, that there is a tendency for the bankers to forget about the theoretical risk which one day can come at light.

Q. As in the Philippines moratorium?
A. Exactly.

MS. FREEMAN: Your witness.

THE COURT: Did I understand your testimony—when she was asking you about interest rates, did I understand your testimony to be that the interest rate on a Eurodollar deposit in Citibank Manila would be substantially the same as the interest rate on a similar [873] deposit in Citibank Frankfurt or Citibank London?

THE WITNESS: What I said, your Honor, I said two things.

1, comparing the interest rate level of Euro deposit and the domestic deposit in New York.

THE COURT: I'm not interested in that.

THE WITNESS: 2, I said that the market should perceive a difference of assessments of the sovereign risk countries of A, B and C.

THE COURT: I'm just asking you what you believe the practice is.

THE WITNESS: The practice?

THE COURT: Yes.

THE WITNESS: Today?

THE COURT: Not today. I mean, in 1983.

THE WITNESS: I don't know in 1983, I don't remember. But probably the market would reflect—I mean, the pricing would have reflected the difference of assessment of the Country A versus Country B.

THE COURT: But I understood you to say it should but it probably did not. That's what I thought I understood you to say.

THE WITNESS: You know, your Honor, to answer correctly your question, I should know the environment back in 1983.

[874] THE COURT: But you don't remember that?

THE WITNESS: But I don't remember that.

THE COURT: All right.

THE WITNESS: But what I'm telling you, today when you take some interest rates, probably the market practice doesn't put any premium on the so-called sovereign risk.

THE COURT: I see.

MS. FREEMAN: If I may just follow-up on that, your Honor.

THE COURT: Yes.

BY MS. FREEMAN:

Q. But the market does nonetheless certain countries that are considered to be so risky where, for example, that banks don't make any placement at all?

A. Yes.

But I will say that the market is also assessing the credit risk of the banks.

THE COURT: Yes, of course.

Are you ready to proceed or do you want some time?

MR. SNIDER: If we might, your Honor, just have a five-minute recess. It is certainly not going to be very long with this witness once it starts.

* * * *

[888] THE COURT: And then when you go on from there, I don't see how you get away from U.S.A.

THE WITNESS: If you apply that—it includes, on the one hand, authorization for Citibank in the U.S. and, on the other hand, authorization approved on a case-by-case basis for foreign branches and subsidiaries of other banks operating in the U.S. and you apply that to each country. It is clearer in the French, if somebody can read French (the witness read in French), in the same country.

THE COURT: I'll take your word for it, but it doesn't seem to me to say that.

BY MR. SNIDER:

Q. Let me ask you this question: Isn't it the case that at CIC European, Mr. Bellanger, that once you had this global limit established for a bank like Citibank, which had its home office in the United States, that if it had a branch that was located in one of the listed countries which were approved and authorized that, according to your own rules and policies set forth here, that the people placing deposits then with Citibank could place deposits with Citibank at branches in any of these countries—

A. Correct.

Q. —without having to do a further assessment [889] of sovereign risk?

A. Correct.

THE COURT: In other words, what he is saying, and I want to make sure that you understand what he's saying, is assume that you have a global limit for Citibank of $200 million.

THE WITNESS: Yes.

THE COURT: Which of these countries is the worst, of the ones listed?

MR. SNIDER: For what purposes, I suppose?

THE COURT: For sovereign risk purposes.

MR. SNIDER: Yes.

THE COURT: Just pick the worst.

THE WITNESS: Cayman Islands.

THE COURT: That's the one that I was going to pick.

THE WITNESS: Okay.

THE COURT: I'm very pleased to hear that.

What he has said, if you had the 200 million global limit for Citibank, your traders could put the whole $200 million in the Cayman Islands.

Is that correct?

THE WITNESS: Yes.

THE COURT: That's what he was saying.

BY MR. SNIDER:

[890] Q. And isn't it true, Mr. Bellanger, that not all of these countries are of equal political risk?

THE COURT: He said that. He picked the worst.

MR. SNIDER: Okay, your Honor.

Thank you.

I have no further questions.

REDIRECT EXAMINATION

BY MS. FREEMAN:

Q. Let me try to clear up what I think is a translation problem or perhaps a proofreading problem on Defendant's Exhibit Q Q. If we look back to that second paragraph under what's marked paragraph 15, it looks to me, and please, Mr. Bellanger, take a look for yourself, that the words in French, meaning strange banks or other banks, are missing from that paragraph. And I believe that's what you have been trying to say.

Is that correct?

A. Exactly.

Q. Okay. So if you were to correct the sentence there, would you say something like, in the last line, "For other foreign branches and subsidiaries operating in that same country"?

A. Yes.

* * * *

[892] THE COURT: Okay.

Anything else?

THE WITNESS: Should we correct the translation, your Honor?

BY MS. FREEMAN:

Q. Perhaps if you can take another look, Mr. Bellanger, at the translation, when you have a few moments, to make sure that there are not any other difficulties like that, now that we're not as pressed for time.

A. Yes.

MS. FREEMAN: Your Honor, if I may make that request, that we just take a look at it and review it.

THE COURT: It was admitted subject to correction, anyway.

MS. FREEMAN: Okay. We'll take a look and make sure there are no other glitches like that that would otherwise be confusing.

BY MS. FREEMAN:

Q. On this other point about where Citibank or where the traders could place all of its deposits, there were certain countries that no matter whether the credit standing of the bank was, the most excellent possible, in [893] certain countries CIC was not authorized to make any placements there whatsoever.

Is that correct?

A. Right.

Q. And unless in fact, unless those particular countries were listed under paragraph 14, there could be no placements there; is that right?

A. Correct.

Q. Is the Philippines listed on there, for example?

THE COURT: No, it isn't.

A. No, it is not.

Q. And is Lebanon, for example, listed on there?

A. No.

Q. Or Iran?

A. No.

Q. So those particular countries were considered so risky, so sovereign risky, Mr. Bellanger, that one could not—that CIC could not make any placements there; is that correct?

A. Correct.

Q. Okay. Now, in addition to your trader looking to what the creditworthiness of the bank was, the trader would also have to look at a country limit, wouldn't he?

THE COURT: He just said not, he said he could put the whole 200 million in the Cayman Islands.

[894] A. Well, that's a question of allocation. It is a question of allocation between authorized countries and the bank. Theoretically, yes, his Honor is right. But practically, there are lines, one global line is used for a bank and—

THE COURT: I am not saying it has happened, but it could happen.

THE WITNESS: It could.

Q. But is the reason that that's so, Mr. Bellanger, is because among those centers, among those countries, those are considered sufficiently safe, if you will, that there is no reason to distinguish for operational purposes, the difference in sovereign risk between those particular countries?

A. That's correct.

THE COURT: You mean there is no reason to distinguish between the Cayman Islands and Great Britain?

THE WITNESS: For that size, we assume the sovereign risk for the full total of the line in both countries.

BY MS. FREEMAN:

Q. But that doesn't mean that there is no sovereign risk in the Cayman Islands, does it?

A. Exactly.

If we had some doubt about one country, probably [895] we would cut down in two ways: We would cut down our global lines for this country or we would eliminate that country—

THE COURT: You are contradicting what you told him. You are contradicting what you told him that the global line for this that country had nothing to do with it.

MS. FREEMAN: Your Honor, I'm trying to clear this up.

THE COURT: When you answered him, I said what you were saying was that you could put the entire global line—

THE WITNESS: Right.

THE COURT: —in one country.

THE WITNESS: Right. That implies at least that you don't have to look at the global line for the Cayman Islands.

THE WITNESS: That's right.

THE COURT: All right.

BY MS. FREEMAN:

Q. But does that mean that there is no sovereign risk attached to the Cayman Islands?

THE COURT: Of course not.

* * * *

TESTIMONY OF RAFAEL B. BUENAVENTURA

* * * *

[900] THE COURT: But as far as you know this was not attached to any of these documents?

THE WITNESS: I would have no way of knowing, your Honor. This is usually prepared by the operations people and normally gets sent out. Under normal conditions people don't even read it, just file it away. So I couldn't tell you that on this particular one, yes, there was an attachment, because I would have no way of knowing that.

Q. Did it come to your attention, Mr. Buenaventura, that from time to time separate leaf attachments were not included with confirmations that were sent out, even if they had this language?

A. I think there were some complaints in terms of not receiving it.

Q. Did there come a time, Mr. Buenaventura, subsequent to the dates of these confirmations—and the last one I will note is dated July 12, 1983—that Citibank Manila changed the form of confirmation with respect to the separate leaf attachment specifically?

A. I believe yes, there was.

Q. And do you recall that the language that appeared in the lower left-hand corner when the change was [901]

made, said, "Subject to the laws and in effect from time to time"? I don't have one to show you, but I want to know if you recall that.

A. Something to the words of that effect.

Q. Would you tell Judge Knapp why the change was made from the separate leaf attachment to including the language that we just discussed on the front page of the confirmation itself.

A. I think that was just to eliminate the question of whether it was being attached, not attached.

THE COURT: So when was this change made?

THE WITNESS: I think this was sometime in July, your Honor.

THE COURT: It might make a difference whether it was made before or after this date in question.

MR. FISCHLER: I can represent to the Court, my understanding is that it was July 20 was the first document that we have that has the different language. I will undertake to have that in the Court tomorrow.

BY MR. FISCHLER:

Q. Mr. Buenaventura, did the change from using the separate leaf attachment to the subject to the laws and in effect from time to time language, which then appeared on the front of the confirmation itself, did you understand that to reflect any substantive change in Citibank Manila's [902] position with respect to sovereign risk?

A. No.

Q. Was it done then directly because you were concerned that from time to time the separate leaf attachment was not being included in the—with the confirmations?

A. That's correct.

THE COURT: Now, was there any subsequent change in the form after this Philippine moratorium?

THE WITNESS: I'm not really sure, your Honor.

THE COURT: It might be worthwhile finding out.

THE WITNESS: Yes, your Honor. I could find that out.

BY MR. FISCHLER:

Q. Mr. Buenaventura, I want to now turn to the subject of the clearing or settlement of Eurodollar transactions entered into by Citibank Manila during your tenure there.

At that time, Eurodollar transactions typically were cleared through accounts maintained with correspondent banks in New York.

Is that your understanding?

A. That's correct.

* * * *

[911] THE COURT: Well, how could that have happened without using Philippine assets?

THE WITNESS: Now, your Honor, in this particular example that I gave, in effect I used Philippine assets.

THE COURT: I understand that.

But it might have been that you paid me without Philippine assets.

BY MR. FISCHLER:

Q. Mr. Buenaventura, perhaps it would help if you told the Judge what assets you used pursuant to the permission by the Central Bank to repay the percentage of the Citibank Manila deposits that were actually repaid in this case.

A. Maybe I can explain better this way:

Do you want me to use a hypothetical example, your Honor?

THE COURT: Do what he suggested, do what you actually did with the 47 percent that you did pay.

THE WITNESS: Okay, your Honor.

At the time when the freeze came about, we had about $600 million of obligations to third-party banks. So

those were foreign liabilities that were frozen. As I said, [912] you can't pay them off.

However, we were able to show to the Central Bank that of the $600 million that we had on deposit, we had 300 million of them in Philippine assets. Therefore, in effect, your Honor, that became part of the foreign exchange reserves of the country.

We happen to have, more or less, and I'm not sure about the exact numbers, another 300 million happened to be placed with banks overseas. It could have been with a Japanese bank; it could have been with a Singapore bank. But they were not, in other words, placed with Philippine-domiciled banks. In other words, they were not, they were not banks that were based in Manila.

So, in effect, your Honor, we said from a foreign exchange point of view, the Philippines really was not owning those reserves because I have a liability overseas, I also am overseas and I own something that's overseas. Therefore, your Honor, for purposes of this request for a moratorium and a standstill agreement, that should not be covered because it was not—because it will not generate an outflow for the Philippines because they were both outside anyway.

Now—and that's how we got permission.

Now, the Central Bank could have taken another action. They could have said, that's fine, they're both [913] outside, but you operate in the Philippines, we want you to bring that back and give it to us. Fortunately, your Honor, that did not happen. That's what allowed us to pay out of the non-Philippine assets.

So that's when Citibank Manila says we have non-Philippine assets. Or from what I was told in the case of Bank of America, they had non-Philippine assets owned by the branch in Manila. And that's the one that we had to get permission on. But we still had to get permission from the Central Bank in terms of getting it.

THE COURT: I understand.

MR. FISCHLER: Your Honor, we jumped a little bit ahead of where I was planning to stay at the moment. But just to note for the record, I'm sure your Honor is interested in the timing of all of that, and we plan to explore that in some detail later on in the examination.

THE COURT: I was trying to find out what a foreign asset was, and I believe I have.

THE WITNESS: I hope I didn't confuse you, your Honor.

THE COURT: What?

THE WITNESS: I hope I didn't confuse you.

THE COURT: You couldn't confuse me. I started off confused.

I believe I have clarified it for me.

* * * *

[919] MR. FISCHLER: Your Honor, as I noted, this has been stipulated as authentic and admissible and I would at this time offer it into evidence.

THE COURT: It is stipulated. It's received.

(Defendant's Exhibit K marked for identification was received in evidence.)

BY MR. FISCHLER:

Q. Mr. Buenaventura, Citibank Manila did not receive this telex, did it?

A. No. This was received by Citibank New York, because they were the foreign creditors.

Q. This was sent to creditors, not to debtors, such as Citibank Manila, is that correct?

A. That's correct.

Q. How is it that you came to see the telex?

A. Well, this was sent back to me from New York by our office.

THE COURT: Not unusual.

THE WITNESS: Yes.

Q. And your understanding was Citibank Manila was one of the debtors to which this telex related?

A. Yes.

Q. I don't want to go through the telex, it's rather lengthy and it speaks for itself as to what it says, [920] but it does discuss a severe loss of Philippine foreign exchange reserves, doesn't it?

A. That's correct.

Q. And would you just tell the Court based upon your reading of the telex at the time you received it as well as your observations in the Philippines at the time what the circumstances were that led to the telex request.

A. Well, the Philippines, your Honor, in 1986, like most commodity producing countries, were experiencing economic difficulties because of low export prices, high oil prices.

However, in the case of the Philippines, this was exacerbated by the assassination of Mr. Aquino in August of 1983. The assassination was even compounded even by the problem that there were rumors that the president had died or was dying and there were also rumors that the military was going to shortly take over and install Imelda as the figurehead.

So I think these rumors tended to—plus, of course, I think the key thing there was the assassination of Aquino, but I think it just led credence to everything that was going to happen subsequently, so that there was now a problem of not only economic problems, but a political instability.

So people sort of panicked and there was an [921] outflow of investments out of the Philippines and, of course, there were a lot of options that were available to the Philippines, like at that point they were talking of different options that may be available to them, such as IMF, additional IMF drawdowns, drawdown of their standby facilities and all of that.

But I think the crisis was so—how would you call it? —so severe that I think the loss of reserves went very quick, so that the only alternative they had, I guess, was to do a freeze, because the fear they had was obviously what would happen if they cannot—if they run out of

reserves and they can no longer import fuel for energy, food, medicines or even the raw materials that they need in order to export again.

So there was sort of a crisis that occurred when the moratorium was imposed, you know.

Q. Was the principal effect of the loss of foreign exchange reserves that you made reference to the fact that the Philippines was unable to continue to import those items which it needed?

A. Well, yes, because they were beginning to lose reserves, foreign exchange reserves.

* * * *

[938] MR. FISCHLER: Your Honor, questioned, as you recall, whether there was a change in the form of Citibank Manila's confirmation at moratorium.

You'll recall the most recent version prior to the change had a legend which said, "Subject to the laws and regulations in effect from time to time."

We were informed last night that in fact, your Honor, there was a change after that, made in December of 1984 or January of 1985.

The language was read to us over the phone, and I asked to have a Rapifax of that sent. There were some problems in the transmission of that, so what I did was simply have a secretary type out what was read to me. I have marked it for identification as Defendant's Exhibit AAA.

MR. McAMIS: Your Honor, I object to this document. It is (a) hearsay on the basis of what counsel has said; (b) he says it was adopted in January of 1985 or December of 1984, which is long after the fact.

THE COURT: I don't know why you would object. It seems to me it would help your case.

MR. FISCHLER: I just wanted to make it clear, I'm not offering this in evidence, I just simply wanted to be responsive to your inquiry for the moment.

[939] THE COURT: It seems to me that I will put it in evidence myself.

MR. McAMIS: Very well, your Honor.

THE COURT: I don't suggest it is conclusive, but it seems to me to be evidence which supports your case.

Be that as it may, I take it subject to your correction. I assume your statement is correct. I assume an original could be mailed at some point.

MR. FISCHLER: I have asked that they follow-up with that, your Honor. If something comes into my office today, I will have it sent down to the courthouse immediately.

THE COURT: Whenever it comes in. I assume that it is correct.

MR. FISCHLER: Very well.

Just so the record is perfectly clear, your Honor, I also want to address one other question that came up with the confirmations yesterday.

(Defendant's Exhibit AAA marked for identification, was received in evidence)

MR. FISCHLER: I indicated to you, your Honor, that it was my recollection that there was a confirmation dated July 20, 1983, which bore the legend, "Subject to the laws in effect from time to time." We didn't have that in court yesterday. However, I do have it now, your Honor. [940] And just so the record is complete and clear, I think we ought to have that at least identified.

I have marked it as Defendant's Exhibit S S. I'm handing it up to your Honor now. And I will give it to the other side. I apologize for the poor quality of the copy, but it is the best one that is available.

Mr. McAmis has seen it before. It was used in Mr. Buenaventura's deposition. If you notice, up in the upper right-hand corner it has a 7-23 up under the date.

THE COURT: What does it say?

MR. FISCHLER: And then the legend in the bottom left says, "Subject to the laws and regulations in effect from time to time."

THE COURT: I see.

MR. FISCHLER: And just so we're perfectly clear, your Honor, I'm informed that although this is dated July 20, the change from the separate leaf attachment to the legend that appears on here actually took effect in October. And this is a confirmation, your Honor, that was sent out in October of 1983, but related to a transaction that had taken place in July.

THE COURT: Oh, I see. So that the date, July, doesn't mean that this document was in existence in July.

MR. FISCHLER: That's correct.

In fact, your Honor, it was the contrary. This [941] was created in October.

THE COURT: I see.

MR McAMIS: That is, October of 1983?

MR. FISCHLER: Yes.

I don't think that was clear on yesterday's record, and I just wanted to make it perfectly clear.

THE COURT: Thank you.

DIRECT EXAMINATION CONT'D

BY MR. FISCHLER:

Q. Picking up from when we were left off yesterday, Mr. Buenaventura, you had explained to us your involvement with the working committee and you were just about to explain to us what something called the Advisory Committee was.

A. Yes.

The Advisory Committee was a committee that was formed by the creditor banks of the Philippines, which was given the task of trying to get the group of creditors together and negotiate with the Central Bank and the Government of the Philippines to—

THE COURT: Creditors?

THE WITNESS: Yes.

* * * *

[962] MR. FISCHLER: Your Honor, I don't understand the question.

If he is asking whether they were unfrozen by virtue of the request, I think that's self-evident, otherwise I don't understand what he is talking about.

THE COURT: I don't quite understand it myself.

Q. Let me get at it this way:

Do you have any reason to believe that if you had applied to the central bank at the same time, in February 1984, to pay the total WFAL deposits with non-Philippine assets of Citibank, that the central bank would have had any objection to that?

A. Well, you are talking of Citibank Manila?

Q. No, I am talking Citibank, N.A.

THE COURT: He is asking you whether you think if you had written to the commission—

MR. McAMIS: To the central bank.

THE COURT: —to the central bank and said, "We realize we can't pay Citibank Manila assets, would you have any objection to paying with assets that are outside of Manila, would you have any objection to that"?

THE WITNESS: I don't think they would have.

Q. In fact, you have testified at your deposition that you believe it would not even have been necessary to [963] make a request to the central bank to pay with Citibank's other worldwide non-Philippine assets, isn't that correct?

A. I believe so.

THE COURT: You believe you did testify and that it is correct?

THE WITNESS: Yes, yes.

Q. And you still believe that today, isn't that correct?

A. Yes.

Q. Isn't it equally true, Mr. Buenaventura, that you never applied to the central bank for permission to pay with Citibank's Philippine assets? You never filed an application requesting payment?

MR. FISCHLER: Your Honor, this—

Q. Requesting permission to pay?

MR. FISCHLER: I object. I think this is just another formulation of the first question that he started with.

MR. McAMIS: It's a different question.

THE COURT: We know what requests he made and I can interpret them as well as anybody else can interpret them.

* * * *

[967] THE COURT: He is asking you, do you know of any other efforts or any efforts that Citibank may have made to make the information in those manuals generally available to the banking world.

THE WITNESS: I'm not aware, but I know that if we were asked—

THE COURT: If you were asked, you would have answered?

THE WITNESS: We would have volunteered it, yes.

THE COURT: But you don't remember any instance of affirmatively trying to convey the information?

THE WITNESS: I would not be.

Q. Specifically, Mr. Buenaventura, do you know of any effort by Citibank Manila to tell Wells Fargo Asia Limited the information in substance that is on Exhibit AAA at the time Wells Fargo Asia Limited placed its deposits in June 1983?

A. I wouldn't know.

Q. Thank you.

MR. McAMIS: I don't have any further questions, [968] your Honor.

THE COURT: Any redirect?

MR. FISCHLER: I have nothing, your Honor.

THE COURT: I would like to ask some questions here.

Your lawyers will probably object to it and say it is immaterial and it may well be immaterial, but I would like your enlightenment that I can get from you.

In the first place, what is your understanding of the rate that Citibank Manila got on its deposits or was required to give on its deposits?

THE WITNESS: This was the 1 and ⅛ they were referring to that was—

THE COURT: No, no, no.

At the time these deposits were originally made, was Citibank Manila paying any different rates than Citibank London or Citibank New York?

THE WITNESS: Your Honor, it's very difficult, really, to say what rates you get, because generally the situation is rates vary depending on your great need or your great need to either borrow or to place—

THE COURT: If you need the money very much, you will give a better rate?

THE WITNESS: Get a better rate.

For example, your Honor, if let's say I'm a Bank [969] Hong Kong—I am just going from my experience, say, in Hong Kong.

THE COURT: Yes.

THE WITNESS: And if sometimes you take what you call an arbitrage position, so what you do is say if I think rates will come down in the next couple of weeks, in other words, all the rates will start coming down, then you say to yourself maybe I better place with the bank.

I'm sorry, I hope I am not confusing you.

THE COURT: You can't confuse you. You may enlighten me, but you can't confuse me.

THE WITNESS: Let's assume rates today are 10 percent for six months.

I, say a bank, in about a week's time the rates are going to be about 8½ because of Fed and discounts and all of that. If one has that view, there is always somebody else that has the opposite view, that's why markets are made.

So if I firmly believe that, then I say to myself I better find someone who has an opposite view and give it to him right away. So, in effect, if let's say today the rate

quoted is, let's say, 9-7/8/10, that is the bid and offer rate, then I will probably say it might as well give it at 9-⅞ because I know it is going to be 9-½ a week from now.

[970] If the other bank on the other sides things that things are going up, he will say 9-⅞ is pretty good, because I think it is going to 10.

Rates vary on perceptions.

The other one, too, is for example, in Manila, let's say in Singapore if you have more funds, if people hit you—normally you have to quote a rate for given amounts.

In other words, that's the agreement among the traders and among the arbitrageurs that if you quote a rate 9-⅞ and 10, you must make a deal. You can always cut it down if you don't feel that bank that is trying to do a deal with you, you say, "I'm sorry, I cannot do that name." But nonetheless, you always have to, because if you keep quoting and you say "I can't do it," pretty soon nobody is going to call you.

So what happens is if you quote a rate of 9-⅞ and 10, obviously if you think rates come down, then you will quote a rate that is 9-⅝ and 9, and if you are a bigger bank, obviously you have no credit problems, so the guys that have excess funds at the end of the day say, "I got to lay it off," so what he tries to do is to look among the big banks the highest rates he can get, and it's a question of perceptions.

Like, let's say Citibank London may not be [971] quoting that day for those rates. When I say not quoting, your Honor, if the offer rate, LIBOR rate is the bid rate, the rate at which you buy and LIBOR is the rate at which you sell, if the LIBOR rate at that time is 9-⅞ and 10 and if London has no interest for six months rates, he will probably quote 9-¼, 9 ½.

In other words, if you want to do my deal with me, give it to me at my rates regardless what LIBOR is, because his problem is if he quotes close enough to the interbank LIBOR rate of, let's say, 9-⅞ and 10, somebody may just hit him and say "yours 10 million."

So then Citibank, because it is a large dealing bank, would find it very difficult to say, "I'm sorry, I can't do it," unless, of course, he can say, "well, it's a no-name bank, I'm sorry, I cannot do the deal."

But let's say it is another money center bank or one of the bigger banks, then he will say, "Hey, you are supposed to be a professional dealer, you make markets and if you quote 9-⅞ and 10, our custom between the two of us is we always agree that you must do at least 10," I mean 10 million.

So each trading relationships differs among each other, so it is really very difficult to pinpoint and say LIBOR rate is the rate at which you either borrow or lend, because there are people that desperately need it and they [972] will pay 11 and there are people that don't want it and they will probably get 9. So it's really a wide range.

Now, obviously at the end of the day, many of the market tradings are really done at the close to LIBOR, but you can't really say everybody must have paid that rate.

I think even in Manila to some extent there was that differentiation, too, because I was saying there was a credit risk assessment, but even there there must also have been a question of need.

So it's very really hard to dissect and say this is credit risk, this is sovereign risk, this is market supply and demand. In other words, at the end of the day it is really a composition of that.

Then the only thing you can probably calculate to its finest degree and you can say if the domestic rate in the U.S. is 8 and there is a reserve requirement of 20 percent and you compute that, you say by inference, therefore, the Eurodollar rate could be eight and a half because that you can calculate with its finite point. But the rest is perception, risk and all of that, your Honor.

I hope I—

THE COURT: I understand.

So an individual trade doesn't necessarily have to go—

THE WITNESS: On the LIBOR rate.

[973] THE COURT: —on the LIBOR rate?

THE WITNESS: Oh, yes, your Honor, it would not.

THE COURT: I suppose the Stock Exchange quotes a given rate, but if I have a million shares I want to get rid of urgently, I may have to take less—

THE WITNESS: That's correct, your Honor.

THE COURT: —than the stock exchange rate?

THE WITNESS: Or if you are a small stockholder, if you give him an order to sell with the broker, it seems you always get the bottom rate. You saw the rate move from 50 to 45 and you ask your broker, he says, "I'm sorry, I did yours at 46," and you say, "How come I am always on the low end when I am selling and I am always on the high end when I am buying," and he says, "Well, the market is wide." So you can't really say.

It is very hard to really pinpoint and there is no way that you can prove that the stockbroker didn't do your deal at 9:00 o'clock in the morning but at 4:00. It is almost impossible.

That's why it is very difficult really to say that interest rates, what is the composition of that.

THE COURT: Now I am going to ask you another question which may be off the wall.

I was interested in what you told me about bank America.

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[990] THE COURT: I assume you're objecting.

MR. FISCHLER: Yes.

THE COURT: I will sustain the objection.

I assume, unless Citibank tells me differently, that all of its customers—I mean, I have to assume that because I have been told that so many times by Citibank counsel

that there was outrage and despair and various other adjectives which I can't remember, so the fact that all Citibank depositors feel the same way as you do, I take judicial notice on the basis of what their own counsel told me.

Whether they thought they were getting—

MR. SNIDER: Your Honor, it is not being offered for that.

Let me just say that we did have—

THE COURT: No.

* * * *

TESTIMONY OF IAN H. GIDDY

* * * *

[1013] Q. From your experiences and contacts with bankers over the years as you've just described them, what conclusions have you come to regarding perceptions among bankers of the allocation between the bank and the depositor of the sovereign risks of Eurodollar deposits?

A. In hundreds of conversations that I have had with bankers in seminars that I've conducted, I can easily say that on no occasion has anybody confronted with that kind of question, argued that either the bank in a particular location or deposits placed in a particular location were completely free of actions by the authorities governing that jurisdiction.

Q. Does that perception of the allocation of sovereign risk change if the Eurodollar deposit is one with a foreign branch of a U.S. bank?

A. No.

Q. Why do you say that?

A. Foreign branches of U.S. banks or Japanese banks or British banks are all widely regarded as being subject to the law of the country in which they do business.

Q. Professor Giddy, what is the effect of a freeze [1014] on repayment of deposits from an economic perspective?

A. When a Government freezes deposits in a branch of a foreign bank in its country, the effect is to prevent repayment of that deposit.

Now, in order to repay one of those deposits, you've got to—the branch has to be able to get the money to do so.

It can do so in a number of ways, but it has to get the money to do so somehow.

If the deposit is denominated in foreign currency, the branch has to take some of its foreign currency and give it to, repay to the depositor. That's the economic effect of a foreign currency outflow whenever one of these deposits is paid.

Q. So, a freeze of repayment of deposits has the effect of securing some sort of control over the assets belonging to the institution subject to that order, doesn't it?

A. A freeze on deposits, although it may not say in the letter of the law that it is controlling the assets, has the effect of controlling the assets because by preventing repayment of the deposits, the Government has indirectly said that you've got to hold on to your assets.

Q. Now, would there be any reason that a Government would stop short of actually seizing assets or asking them [1015] to be turned over to the Government, but take some measure to try to maintain their control within the jurisdiction?

A. When a branch does business in a foreign country, or even in this country, its assets are owned by an entity in that country. Therefore, could, in principle, be seized or frozen, whatever your words are, by the Government of the country. But doing so is usually a very dramatic, drastic action that could trigger international repercussions, and in fact might be very difficult to enforce.

THE COURT: Why would it be difficult to enforce?

THE WITNESS: Because the assets might be outside the country. The assets may be held by an entity within that country but in order to do so, your Honor,

they might have to round up all the borrowers of the bank's assets.

It is easier just to go to the bank and say, we're putting a freeze on all your deposits, rather than try to effect control of all the assets inside and outside the country.

That's a dramatic action that's not taken very often, although it has certainly been taken in some cases where nationalization has seized all the assets—in fact a whole branch itself as in a Cuban case.

Q. But it might be a little less likely to start a [1016] litigation stampede with claims against the country seizing assets, wouldn't it?

A. Yes, it would be much less likely.

Q. Professor, do you have any doubt that Citibank Manila was subject to the Philippine law and regulation?

A. From everything that I've read it was a branch doing business in that country, a full branch, one of the biggest banks in the country. Therefore, it must be subject to the law and regulation of that country.

Q. Do you think any banker would have any doubt about that?

A. No.

Q. Let me ask you to consider a hypothetical situation. Assume that Citibank Manila has deposits owing to foreign depositors. It must, by definition, have some assets to balance those deposits, I take it.

A. For every liability there is an asset, yes.

Q. And those assets could be either local assets or external assets, could they not?

A. They could be assets held in the Philippines or they could be assets held outside the Philippines, if that's what you mean, yes.

Q. An external asset, or an asset held outside the Philippines, for example, would be a Citibank Manila Eurodollar deposit with the Bank of Tokyo in Japan; is that [1017] correct?

A. Yes, that would be an asset held outside the country by Citibank Manila.

Q. But it is still an asset of Citibank Manila, is it not?

A. Yes, it is.

Q. It is not an asset of Citibank London, is it?

A. I don't think so.

Q. Or an asset of Citibank New York, is it?

A. No.

Q. Is that the way bankers, active in this practice, Professor Giddy, perceive such deposits?

A. You mean the deposits in Tokyo?

Q. Yes.

A. Yes, bankers regard those deposits as held by Citibank Manila in Tokyo.

Q. Assuming there were a demand—strike that.

Assuming that that deposit were a demand deposit, payable on demand, would bankers expect the Bank of Tokyo to pay that deposit on demand from, say, Citibank Brussels?

A. No.

It is a deposit of Citibank Manila. Therefore, Citibank Brussels couldn't withdraw the funds.

Q. Nor would the Bank in Tokyo pay on the demand of Citibank's head office in New York.

[1018] A. No, unless instructed to do sole by the Manila branch.

Q. Because it is an asset of the Manila branch; is that right?

A. That's right.

Q. Even though that asset is represented by a liability of the bank outside the Philippines; is that right?

A. You mean the Bank of Tokyo?

Q. Yes.

A. Yes, that's correct. It is still an asset owned by Citibank Manila.

Q. And a local asset, in contrast, would be a loan to a local Philippine borrower or a local deposit with a Philippine bank in the Philippines?

A. Those would be examples of local assets, yes.

Q. Now, from the point of view of the Philippine Government administering its problems with its economic crisis, what difference would it make if Citibank Manila repaid a deposit by liquidating a local asset or a foreign asset?

A. In both cases, when Citibank Manila liquidates the local or the foreign asset, it still has to pay foreign currency—namely, dollars—to effect repayment of the deposit. The difference might be that since [1019] Citibank Manila held the Bank of Tokyo deposit outside the country, and it was already in dollars, and when they made the net outflow there would be—when they made the repayment there would be no net outflow of funds, that might be regarded a bit different by the Philippine Government, even though they still would in principle have control over that deposit.

Q. Control in the sense that they could order Citibank Manila to pay the proceeds of that deposit to the Philippine Government when it matures; is that correct?

A. Well, since Citibank Manila is subject to their laws, they could do that, although that would be a drastic action of the kind that I described.

Q. Well, that kind of drastic action occasionally happens, doesn't it, Professor?

A. Yes, it does.

Q. And hypothetically, if the communist forces took over or had taken over in the Philippines instead of Mrs. Aquino getting elected, and if the new Government took over the assets of Citibank Manila including the claim of Citibank Manila on the Bank of Tokyo, the Government would try to liquidate that claim against the Bank of Tokyo, wouldn't it?

A. They could try, yes.

THE COURT: But the Bank of Tokyo would probably [1020] not honor it.

THE WITNESS: That would be a judgment by the Bank of Tokyo as to whether it would not honor its obligation to Citibank Manila. It could, it could honor it.

Q. What do you think it would do if the Bank of Tokyo had some assets in the Philippines and the new Government in the Philippines says, hey, pay me, I've now taken over Citibank Manila?

A. That would be an example of why the Bank of Tokyo might honor that deposit.

Q. Might dishonor it?

A. In order to recover their greater loans to the Philippine Government.

Q. They might try to set it off?

A. Yes.

Q. Aren't you aware that that's just the kind of thing that happened as an aftermath of the Cuban revolution?

A. That was before the time I held these seminars. But yes, I believe something of that character was the case. There was litigation also.

MR. HOFFMAN: Perhaps I can ask the Court to take judicial notice of the fact that the Cuban asset litigation has been going on in this Courthouse, started back in 1960 and continued for about the next 25 years.

THE COURT: It is still going on, isn't it?

[1021] MR. HOFFMAN: Yes.

(Pause)

BY MR. HOFFMAN:

Q. Now, let's get back to the point, Professor. Foreign assets of a local branch bank thus have potentially less value to the local Government, don't they?

A. Their monetary value is the same, even better perhaps, but they're harder to enforce.

Q. If they get to this sort of extremist situation where they want to grab it?

A. Then they're harder to enforce. Therefore, in that sense, they're less valuable, yes.

Q. I believe you already said, Professor Giddy, and correct me if I'm wrong, that the Philippine Government would consider a deposit with the Bank of Tokyo by Citibank Manila an asset within the control of the Government of the Philippines.

Correct?

A. Yes.

Since Citibank Manila is within that control, therefore its assets are, too.

Q. And if Citibank Manila had a deposit with the Bank of Tokyo, the Philippine Government would expect that it could order, if it wished, Citibank Manila to pay over that asset to the Philippine Government on maturity?

[1022] A. Yes, it could do that.

Q. Now, would the Philippine Government consider a deposit with the Bank of Tokyo by Citibank Brussels as an asset within the Philippine Government's control?

A. Of course not. If it is an asset held by Citibank Brussels, it is not within their control.

Q. So the Philippine Government wouldn't care if Citibank Brussels, or for that matter Citibank head office, if it had the deposit with the Bank of Tokyo, pay Wells Fargo Asia Limited's claim in this litigation, would they?

MR. SNIDER: Your Honor, I believe that calls for speculation as to what the Government of the Philippines cares about or would do.

MR. HOFFMAN: Well, I guess I am asking him to speculate, your Honor.

THE WITNESS: I can speculate on that, your Honor.

THE COURT: I'll let him speculate.

Q. Please.

A. It seems to me that the Philippine Government wouldn't care if two entities outside the Philippines

agreed that one would pay the other some money that had nothing to do with the Philippines.

Q. And they might expect that Citibank might even decide to do that to maintain good business relations with [1023] Wells Fargo or if it received reciprocal business for other reasons?

A. That might very well be the case.

Q. I'll ask you to refer to a document that's been marked Plaintiff's Exhibit 33, Professor Giddy, which is a list entitled "Bases for Opinion of Dr. Gunter Dufey," which has been referred to in the course of this trial.

A. Yes, I've heard of it.

Q. And have you seen it?

A. Yes, I've seen it, too.

Q. Now, I'd like to call your attention to item No. 4 and relate that to the testimony you've just given. But take a moment to read item No. 4, which for the record says:

> "The other foreign institutions taking dollar interbank deposits booked at their Manila branch repaid or otherwise satisfied their depositors."

Do you see that?

A. I see it.

Q. Do you have any knowledge of your own about the facts that are supposedly referred to in that paragraph?

A. I read reports in the press. That's all the knowledge that I have.

Q. Now, Professor, if Citibank decided to pay Wells Fargo's claim with a deposit on the Bank of Tokyo or some other asset that it has outside the Philippines, that would [1024] be one of those "or other satisfied their depositors" items, might it not?

A. That would be one way of satisfying the deposit, yes.

Q. If a judgment were obtained against Citibank in this case, and Citibank paid the judgment, as I think we all recognize it has the assets to be able to do, the Cen-

tral Bank of the Philippines wouldn't care about that, would they?

A. Not unless it reduced the assets under the control of the Central Bank of the Philippines.

Q. But do you see any obligation of Citibank to do that?

A. No.

Q. And from your experiences with bankers in the course of your professional career, do you think any bankers would see that Citibank has any legal obligation to do that?

A. I can't speak for all bankers. But the vast majority of bankers that I've had contact with over the years would recognize that if a sovereign Government took an action like that in the Philippines, they would be subject to that sovereign risk. Therefore, those deposits would be subject to that same jurisdiction. And if Citibank had those deposits frozen, then Citibank would not [1025] be obliged to pay those deposits elsewhere, legally speaking.

Q. Let's consider another situation, Professor. Are you aware of the fact that Citibank Manila got permission after a period of time from the Central Bank to repay some of the blocked deposits to the extent of its foreign assets?

A. Yes.

I believe that Citibank and the other banks in the Philippines got permission to repay their deposits from outside, pro rata, to the extent that Citibank had assets outside the Philippines.

Q. Now, from an economist's point of view, why would the Central Bank of the Philippines agree to do that?

A. Well, for the reasons we discussed earlier, despite the fact that they, in effect, could assert control over those assets, they might have decided that they were unlikely to be able to enforce that control or didn't wish to take the drastic actions. Therefore, those weren't assets

that would be coming in to them. Therefore, it wouldn't matter if they went out.

But the assets that were already in the Philippines, had they been liquidated, would have involved a net outflow of foreign exchange. And so it was unlikely that they'd be willing to do that. So that may be their [1026] thinking behind why they made that decision.

Q. Now, aside from this list that you have in front of you, have you seen any of the other charts that Professor Dufey prepared and testified about in this trial?

A. I've seen some tables. I don't know about charts.

Q. I'll hand up—well, call them tables. I'll hand up Plaintiff's Exhibits 34, 35 and 36.

A. Yes.

Q. Have you seen those?

A. Yes.

Q. Have you studied them?

A. Yes.

Q. Have you read Professor Dufey's testimony about these charts and the conclusions he draws from the data presented on these charts?

A. I have.

Q. Now, Professor Giddy, referring to the first chart, just by way of example, Plaintiff's Exhibit 34 entitled "Chart 1," you see a column 2 that lists the names of Philippine banks, do you not?

A. Yes, I do.

Q. Do you know anything about any of those banks?

A. I've heard of Development Bank of the Philippines and I've heard of China Banking Corporation.

• • • •

[1028] Q. Well, there are a number of elements reflected in an interest rate, aren't there?

A. Yes.

Q. For example, the cost of funds?

A. Yes.

Q. Credit risk?

A. Yes.

Q. Sovereign risk?

A. Yes.

Q. Anything else that you can think of?

MR. SNIDER: Well, your Honor, now he's leading the witness. The witness said he can't even testify beyond that. Counsel has now suggested two or three things and is prompting the witness.

THE WITNESS: I can't break it down, but I can certainly say those items are included.

Q. Well, that's my question: Are you able, by looking at that rate, to break it down and say that 10 percent is so much cost of funds, so much credit risk, so much sovereign risk?

[1029] A. No.

Q. Do you have a judgment whether that rate reflects solely sovereign risk?

A. I very much doubt that it reflects solely sovereign risk.

Q. There has got to be something in there for cost of funds, I assume; is that correct?

A. Yes.

Presumably banks don't place money with other banks or make loans below their cost of funds. Therefore, there is something—the major component of that is probably cost of funds.

Q. But you can't tell by looking at that rate, Professor Giddy, can you, how much sovereign risk there is, how much credit risk there is, how much cost of funds?

A. No, because I read in the footnote that these are interest rates paid to Wells Fargo Bank. And how should I know what Wells Fargo paid for the money that it is lending to these banks?

Q. You mean how much International Corporate Bank paid for the money, don't you?

A. I mean how much Wells Fargo paid for the money it is lending to International Corporate Bank.

We said some of this is cost of funds. And cost of funds is—

[1030] THE COURT: It is what Wells Fargo had to pay to get the money?

THE WITNESS: Yes. Over and above that, your Honor, they got some premium. I don't know what the components of the premium are, but it is part of its risk.

BY MR. HOFFMAN:

Q. Now, Professor, look at Column A, which is entitled "LIBOR Interest Rate."

A. Yes.

Q. Do you know if Citibank funds itself at LIBOR rates?

A. I read Mr. Howard's testimony and I just heard the discussion, and I think it should be very clear, and I confirm this, that Citibank may occasionally at some branches at some times pay LIBOR if they came to get funds. But on other occasions they'd pay LIBOR and on other occasions less than that.

In fact, Citibank, being one of the biggest international banks—at this time, I believe it is either No. 2 or No. 3—would likely be paying much less than the average, if it had good traders.

Q. What judgment can you draw, if any, from the comparison on this chart between the interest rate paid by International Corporate Bank and LIBOR?

A. International Corporate Bank paid 112.5 basis [1031] points above LIBOR. That's the only comparison that I can see.

Q. Can you make any judgment how that spread was broken down?

A. No.

I mean, I'm even going to go further, I don't even know what was the spread, because I don't know what Wells Fargo's cost of funds were. It is not a valid comparison to say that this was the spread.

Q. I'd like you now to refer to Chart No. 4, please. That's Plaintiff's Exhibit 37. I think it is in the batch of papers that you have there.

Have you seen that chart before?

A. Yes.

Q. Have you studied it?

A. Yes, I have.

[1032] Q. What conclusions, if any, are you able to draw from the data presented on that chart?

A. Columns 4 and 7 show clearly that on all of these occasions the London Interbank Offer Rate was higher than the domestic rate as listed here.

Q. Why do banks pay less in the United States?

A. They pay less because they are subject to additional costs. Those additional costs include reserve requirements as being brought up a number of times in this case and deposit insurance fees which are not imposed on Eurodollar deposits, and according to some bankers the taxes are higher in New York than in some locations abroad so they can't afford to pay as high a rate as they can on a deposit free of those.

Q. These Eurodollar traders are always looking out for the best rate they can get, aren't they?

A. Eurodollar traders certainly are.

Q. And with this worldwide network of communications, they can virtually place their funds anywhere they want, can't they?

A. Anywhere with reason.

Q. And subject to their limitations?

A. And subject to their limitations.

Q. Why in the world would any of them place their money in the United States if they can earn a higher rate [1033] outside the United States?

A. Very few of them do place their money in the United States when they can earn a higher rate outside the United States, but the fact that some do means that either they regard the United States as so much safer than placing your money abroad that they are willing to accept that much lower rate or they have some kind of constraint on them imposed perhaps by their board of directors or trustees or something who themselves regard

foreign deposits as riskier that prevents them from taking their money and earning a higher rate offshore.

Q. And placement in the United States, even that reflects some sovereign risk, doesn't it?

A. It certainly does, as the Iranians know full well.

Q. And the Libyans, I take it?

A. And the Libyans. And the Nicaraguans one of these days perhaps.

THE COURT: We heard that the Russians were concerned about sovereign risk here and started the Eurodollar market.

THE WITNESS: That's right.

MR. HOFFMAN: Your Honor, I only have one or two more questions and I think I can conclude if you will bear with me one moment.

* * * *

TESTIMONY OF RODNEY B. WAGNER

* * * *

[1066] THE COURT: Even though the bank is not legally responsible for its—

THE WITNESS: Yes, that's right. But we are willing to assume that the bank will back up something that it has a hundred percent of. They don't have to, but we expect that they would, so we operate that way.

Not so that if they owned—they might own 95 or 98 percent. We say, no, set it up separately, because there the minority shareholder just might say you can't back that up and make a very good case for that.

Q. Other than credit risk, there was another aspect that you also analyzed, that is sovereign risk.

A. Yes. On the sovereign risk element of it, what we do is we are concerned about where we place our money, where we make our deposits.

Q. That is the country, the location?

A. As a country, not as a specific bank credit.

So what we do is we have a list of all the countries in the world where we would do this kind of business and

every month there is a fellow in our treasury operation that comes and meets with me and his assistant [1067] comes, too, and for each country we put a limit as to the amount of money we will allow to be placed there. That is a deposit with any entity in that country.

And we have a large number of countries around the world where the limit is zero, they are not allowed to make any deposit there, and somewhere we will have, you know, an amount we specify, it might be 10 million, 50 million or a hundred millions, and there are some countries we don't worry about, a Germany, a Japan or an U.K.

For us we have operated on the basis it doesn't make any difference who the bank is. I mean, it could be the Deutschebank, for example, that has a branch in Panama and if they come to us and want a deposit with a Deutschebank in the U.K. or Deutschebank in France, fine, but if it is Deutschebank in Panama, that would be on a very, very strict control with us, because we have always operated on the basis that if for some reason something happens in that country and the laws are put down or the country takes steps to prevent foreign exchange from going out and that branch isn't able to pay, then the home office has absolutely no legal obligation to pay us.

Q. Is that what you mean when you refer to sovereign risk?

A. Yes in that case for the placements on sovereign risk.

* * * *

[1072] Q. And in those situations, you would not then look to the head office to be repaid?

A. No, absolutely not. We have always in Morgan Guaranty operated on the basis if you make a deposit, you look and, in fact, we operate that way for anybody who deposits money with us in any of our branches, that they should be aware that what they are doing is placing money in a country and our branch is subject to the laws

of that country and if they pass a regulation, rules, laws, whatever it is, and blocks us from paying out, then that money is blocked in there.

Now, as a business judgment, we might chose to pay, but that doesn't go to the legal question. It might be that for purposes of our reputation or for maintaining our position in the markets so far as being able to attract deposits, whatever it may be, we might feel it would be a better thing for us to pay than not to pay. But legally, no, we have, we have—

Q. So if Morgan made an interbank placement, let's say, with Citibank Manila, the sovereign risk would then be in the Philippines?

[1073] A. Absolutely.

Q. And Morgan wouldn't expect to go back to Citibank in New York for repayment?

A. Oh, we would go back to them, but—

Q. Other than a business matter, would you expect—

A. Yes. But from a legal point of view, we would—I mean, that's the way we operate, it's our policies, the same. We would accept immediately that legally we wouldn't have grounds for being paid, but from—sure, we would go to Citibank and tell them it's bad business to not pay us.

Q. But other than a business decision, you wouldn't expect to be repaid necessarily?

A. No.

Q. Were these policies assessing sovereign risk and the consequences of sovereign risk consistently followed by Morgan Bank in your experience?

A. Yes.

Q. And do you have a view whether other banks active in the Eurodollar markets share your understanding that deposits with foreign branches bear the sovereign risk of the country where the branch is located?

A. Yes.

* * * *

[1080] Q. At the present time you're a net taker, then?

A. Well, a net taker in that category. But there are other ways of raising money. So it might be French francs, Japanese Yens, longer-term notes, private placements; it could be all sorts of things.

Q. Okay. Now, does the person or other bank who is placing the deposit with Morgan Guaranty in the interbank deposit market, is that person or bank told where Morgan Guaranty is going to end up using the funds?

A. No.

Q. You could take an interbank deposit in London, could you not, and then use the funds to loan it or fund to some other operation in Argentina?

A. Sure.

I mean, you can imagine—first of all, the depositor is not particularly interested in that. I think what they're interested in is our capital, our record, are we a safe institution to put money with, and so forth. I think that's what they look for. And then they look at the [1081] return they get.

But I mean, administratively, to try to trace dollars that came in and say that this one we put a blue tag on and it ends up over here with the blue, and the others, not possible.

Q. People don't trace the dollars, do they?

A. No.

Q. But what they do expect is they expect to get paid upon maturity at the time they want the principal back; right?

A. Sure.

Q. Now, Mr. Wagner, in your testimony—

A. They're not used to giving their money away.

Q. Sure.

In your earlier testimony on direct, Mr. Wagner, you said that, as a legal matter, when a deposit was booked with an offshore branch, that in that instance you would not expect or that there would be the obligation, the obligation would not be repaid if it were blocked somehow at that foreign branch.

Do you recall that testimony?

A. I said that what?

Q. I didn't say it nearly as well as you did. Let me try it again.

Do you recall in your direct testimony, sir, [1082] that you said that, as a legal matter, if a deposit is placed, interbank deposit is placed with a bank and it is booked at an offshore branch, and something arises in the foreign country in which the branch is located, that it might be, as a legal matter, sir, that you were unable to get your money back, that you could not be repaid.

Do you recall that testimony?

A. Yes.

Q. You also said, though, that you'd still expect to be repaid and you'd go talk to Citibank about it, didn't you?

A. Yes.

But I also said that their obligation to pay would be really a business judgment.

Q. Yes.

A. And they would have to take into account, if they didn't pay, how this might affect their reputation in the market, what image they want to project, and so forth. And it could be that for their business judgment reasons that they wouldn't pay.

THE COURT: They would or would not?

THE WITNESS: They would not.

A. And if they decided not to pay, then legally we don't see that we have any recourse to go to Citibank's head office and say, you owe us that money, pay up.

[1083] Q. Sure. But they also could decide, as a matter of business judgment, to protect the reputation, and so on, that even if they weren't legally obligated to pay, that they might go ahead and repay you anyway, so you'd go ask; right?

A. Yes, absolutely.

Q. And isn't it true that there is no consistent practice in the interbank deposit market with respect to whether bankers in those circumstances would expect not as a legal matter but as a matter of business practice and judgment whether the deposit-taking institution would repay or not, to be paid at the home office?

A. The practice in the market, as we understand it, is that the people who are in this business are not small, innocent individuals, they are entities that are quite sophisticated.

A large part of this money is flowing from banks. They have excess money to place. They're coming from pension funds, insurance companies. It comes in large amounts from sophisticated people.

And our understanding in the market and the way the market operates that if you place that deposit, whatever that jurisdiction that it goes into, that's what you look to to get your deposit back out. If there is a problem, you're going to get stuck in there.

[1084] Q. And as a legal matter, you might not be able to be repaid; is that right?

A. Yes.

Q. I'm now trying to look at the other half of your testimony. You said that even if you couldn't legally be repaid because of something that happened in the country in which the branch was located, you would still go talk to the bank, the home office of the bank in question and they might or might not pay you.

A. Right.

Q. Isn't it true, sir, that there is no consistent practice in the interbank deposit market that once you went to talk to the home office of the bank, that as a matter of business judgment they would decide to either repay or not repay your deposit?

A. Well, I don't think we have an awful—this is not a daily occurrence, this type of thing. It happens. I think you're absolutely right. I think it is up to the institution to make up its mind what it wants to do.

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TESTIMONY OF IAN H. GIDDY

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[1095] THE COURT: Well, in the normal course—on ths particular day you said that in all probability, the Manila rate and the Frankfurt or London rates would have been the same on Reuters.

THE WITNESS: They were quoted to be roughly the same, that's right.

THE COURT: On this day in question?

THE WITNESS: Yes, that's right.

THE COURT: Now, is that the normal situation, for them to be roughly the same?

THE WITNESS: Let me put it this way: It is normally roughly the same across a fairly wide range of financial centers when you're talking about interbank deposits.

The reason for that, your Honor, is quite simple: That, as Mr. Buenaventura said this morning, when a trader is looking at the rates he's willing to pay, he's not going [1096] to make a judgment that I want to demand such and such a premium for each country. He doesn't have the time or the skill.

It is the Credit Committee, such as the one Mr. Wagner belongs to, that makes that kind of judgment. The trader can't. Therefore, the trader will say, I'll place my funds wherever I can get the best possible rate at this time, within a reasonable geographic range and at the maturity he wants and within the limits proscribed by the Credit Committee or whoever governs, the manager of the Treasury Department.

So he's not going to say that I must get a higher rate for Hong Kong because the Chinese might move in. He's going to say that's within my limit, it is a base rate for the day, or maybe Singapore is a better rate for the day.

That's why rates tend to be similar across borders, irrespective of the Credit Committee observations, because the trader is not making that judgment.

THE COURT: I think I interrupted you when you tried to tell me what function these sheets have.

THE WITNESS: The function of a sheet like that, your Honor, is that people like to keep records of roughly what rates of different maturities are. They make analyses of the term structure of interest rates, which means the [1097] difference between short term, medium and long term rates—1, 3 and 6 months. That's one purpose, for example, that it serves.

Banks keep records so they can do trend analyses, so they can look at what the future of a six-month rate might be, such as what Mr. Buenaventura might do in Hong Kong.

Another function might be that if they're not active in the market, they're not gathering personal intelligence as to what is happening to rates, they might want to keep records so that they can give an indication of whether the rates on their books are high or low. But they won't make it a basis for a decision to invest.

[1098] Q. Dr. Giddy, I was merely trying to establish that if you have looked at what has been marked as Plaintiff's Exhibit 13, which is this Reuters rate sheet of June 11, 1983, it has now been received in evidence, that this is, in fact, the same one you relied on in your affidavit when you made the statement that on June 10, 1983, that the rates in all of those locations were on the order of 10 percent and that that is, in fact, what you produced at your deposition and were examined about at your deposition?

(Handing to the witness)

(Pause)

It happens to bear the same Bates stamps number as Exhibit 2 to your affidavit which is the one that Mr. Hoffman suggested we look at.

A. Yes.

Q. You are looking at the page that is Bates stamped C 105?

A. Yes.

Q. And can you identify that as the rate sheet that you took the information from when you made the statement in your affidavit that I have just read?

A. Yes.

Q. Thank you.

And wasn't it a fact on June 10, 1983, that the indicated rate, the quoted rates in all three countries or [1099] locations, if you will, London, Frankfurt and Singapore, were on the order of 10 percent?

A. Yes.

THE COURT: Did Manila appear on that list?

THE WITNESS: Yes, I believe there is.

A. There is a Manila rate on that sheet, isn't there?

Q. Let me have you try to identify it. We haven't been able to identify it, but maybe you can.

A. I saw Manila fixing—

Q. That is not a U.S. dollar deposit?

A. No.

Q. I'm sure if there was Dr. Dufey would have found it, because he has been looking, too.

Now, 10 percent, that was the same rate of interest that Citibank paid on the deposits involved in this case to WFAL on June 10, 1983, wasn't it?

A. Yes.

Q. Isn't it fact that bankers generally demand a premium for taking more risk when making a loan or placing a deposit?

A. As a general rule, with the exception of the situation for traders that I have just described to the judge.

Q. In your deposition you didn't make that [1100] qualification. Didn't you say as a general rule that bankers generally demand a premium for taking more risk when they make a loan or place a deposit?

A. As a general rule that is so, yes.

Q. Yes or no?

THE COURT: He said yes.

Q. Yes?

A. It certainly is the case, yes.

Q. You just talked to his Honor about what a trader does on a given day, he doesn't have time according to your testimony when he is making these trades in a very short period of time to go around finding out exactly what the rates are in each of these places and assessing the risk and that's why they have these credit policy committees.

Do I have your testimony right?

A. No, I didn't say that. I didn't say he doesn't have time to go and see what the rates are in these places were. He does. That's his job.

Q. He doesn't have time to go assessing the relative riskiness of the relative jurisdiction at that point of time when he makes the trade?

A. That is not his job and generally he doesn't have the skills, either.

Q. Wouldn't you expect, Dr. Giddy, over a period of time, say a month or two, if one jurisdiction was known to [1101] be riskier than other jurisdictions that over that period of time that sophisticated bankers who are dealing in the interbank deposit markets would recognize that difference in riskiness and that that then would be reflected in the rates in the interbank deposit market?

A. It could be. It could also be reflected in the amount of deposits that are placed there.

If you recall Mr. Wagner's testimony that they reduced their credit limits to particular locations such as the Philippines, therefore, instead of being reflected in the rates, which is a trader's business, it might be reflected in the quantities.

As an economist we know there are plenty of cases where rates or prices are identical in two locations, but quantities are the thing that make the adjustment.

Q. Let's see if you can answer my question.

Q. Let's try it again, Dr. Giddy.

It's true that for some money market centers no deposits may be placed with them at all, in fact, after this Citibank situation happened, there weren't any more deposit placements in Manila after a while, were there?

A. I don't know.

Q. You don't know that one way or the other?

A. No, I don't know that.

* * * *

[1117] Q. And they could have gotten the same interest in London, couldn't they?

A. Yes, and in Hong Kong.

Q. Thank you.

Isn't it true that you said in your deposition that if the interest rate is essentially the same in two places, where there is a different degree of risk, that the assumption of sovereign risk is not reflected in the interest rate?

MR. HOFFMAN: Can we have the page if he is going to read from the deposition?

MR. SNIDER: Page 107, lines 7 to 12.

A. I don't remember saying that, but I'm sure it sounds plausible to me.

Q. Would you look at the question and answer from page 107, lines 7 to 12, and tell me whether you were asked that question and whether you gave that answer on that day.

(Handing to the witness)

(Pause)

A. Yes, I did, evidently, and I would still give the same answer.

THE COURT: Could I see it?

THE WITNESS: Here (Handing to the Court)

THE COURT: He says he said it and still says it.

[1118] MR. SNIDER: Right.

Q. Dr. Giddy, we have now established that you don't know whether WFAL paid any risk premium and we have also established that what WFAL paid on June 10,

1983 was on the order of 10 percent which was essentially the same market rate of interest as was available in London, in Frankfurt and Singapore, correct—I'm sorry, WFAL received, not paid. I misspoke. You have agreed with that so far?

A. Yes.

Q. Then doesn't it also follow given the question and answer that we just went through in your deposition that if you look at the interest rate that WFAL received, that it did not reflect an assumption of sovereign risk?

A. The interest rate was identical—

Q. Can you answer the question yes or no? Did the interest rate reflect it? Yes or no?

A. It didn't.

THE COURT: It did or didn't?

THE WITNESS: It did not.

Q. That's all I asked.

A. The interest rate did not.

Q. You heard—I'm not sure you heard. Have you read the trial testimony of Mr. Schmidt of Marine Midland?

A. No, no. The famous Gil Schmidt, is it?

* * * *

[1124] Q. I am not talking about that, I am just—

A. That is not the same as debt moratorium. You said restricting their assets.

Q. Let's take the word debt moratorium out of it.

A. Okay.

Q. What if the Philippine government just says you can't repay with these particular deposits, the local Philippine deposits—

A. You mean you can't repay with the deposits?

Q. You can't use this particular—these funds, this amount of money, these local assets and deposits, okay, you can't use that.

A. Okay. In other words, the bank, the branch in the Philippines owned assets, they said you can't transfer those assets to repay funds or make foreign exchange transactions—

Q. Right, dollars, because we want to keep those dollars in the country. Then wouldn't most banks still expect to be repaid?

A. Yes, if the decree had only to do with the bank's assets, then the liabilities remain intact.

Q. And the expectations of bankers, the practice, that's what I am trying to get to, is that they would be repaid by the home office, isn't it?

A. Under the circumstances where the branch had its [1125] assets restricted or seized, and that was a poor loan decision by the bank and it's their risk, they are still liable for their deposits.

Q. Okay.

Are you aware of any instance previous to this Philippine situation in which a depositor with a major money center bank that was based in the United States—we are talking about an U.S. dollars now, money market—

MR. SNIDER: Let me just strike this question, your Honor. It's not even going anywhere in my mind and I am getting a little tired. I am going to strike that question.

THE COURT: All right, start over fresh.

MR. SNIDER: Okay.

Q. You testified in your deposition, didn't you, that it was your understanding, I believe were the words, that Bank of America did repay its depositors in the Philippine situation, didn't you?

A. Yes. I read something to that effect in the news at the time, although the specifics were never clear to me.

Q. That was your understanding?

A. In a vague sense.

* * * *

[1129] Q. And doesn't it follow from the analysis of supply and demand on the board that when there is this kind of disruption that we have just talked about, that supports the analysis that you just agreed with, what's on the board?

A. After disruption, absolutely.

Q. After disruption?

A. Yes.

Q. Even before the Phillippine moratorium was imposed in October of 1983, didn't most bankers view Manila as being riskier than London?

A. I would expect so. It seems reasonable to me.

Q. You yourself would expect—

A. I myself, certainly. But then, I regarded Hong Kong as pretty risky, too.

Q. And Singapore?

A. Singapore much less so.

Q. Still riskier than London?

A. Still riskier than London.

Q. Absolutely. And yet the rate you said earlier was the same, wasn't it?

A. On that particular date the rates were the same. But I will supplement—

* * * *

[1137] Q. Do you know of any other precedent for what happened in the Phillippines where all they did was restrict—well, we're back to that problem. I'll just strike the question. We're talking in different terms.

Rather than asking you the question, let me just point you to your deposition and maybe we can move through this quicker. If you'd turn to page 68, line 20, over to page 69, line 5. And I'll just ask you the same question you were asked at your deposition.

"In a situation where, let's say, as of June 1983 where local law forbid payment by a branch with assets carried on the books of that branch but did not forbid payment by the bank with other assets, do you have any understanding whether as of that time most banks would have repaid deposits under those circumstances?

"A. I don't know."

Is your answer the same today?

A. Yes.

Q. You don't know?

A. I wouldn't change that answer.

Q. And then you were asked, "You don't know one way or the other?

"A. I don't know one way or the other."

[1138] Is that still your testimony, Professor Giddy?

A. Yes.

Q. So it follows, does it not, that there is no practice or custom, Dr. Giddy, that most banks would have not repaid the deposits in the circumstances described in that question?

A. This is a very specific circumstance.

Q. That's the one I'm asking you about.

A. And it does follow, yes.

Q. It does follow, doesn't it?

THE COURT: Don't ask gilding questions.

MR. SNIDER: I have no further questions at this time, your Honor.

THE COURT: Any questions?

MR. HOFFMAN: May I have a moment, your Honor.

THE COURT: Yes.

(Pause)

REDIRECT EXAMINATION

BY MR. HOFFMAN:

Q. Professor Giddy, excluding an extreme situation, if you compare LIBOR to an actual rate paid in Manila on a given day, can you draw any conclusions about the amount, if any, of the sovereign risk component of the Manila rate?

A. No, I can't.

* * * *

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[1180] MR. SNIDER: And it would seem, your Honor, that this brief should deal with matters of law, and not be a further attempt to try to put in evidence on the issue of custom. And that's what I understand they are going to try to do. That's what worries me about it, because the evidence has now been received by the Court and should be over.

THE COURT: Well, the brief would be confined to the evidence in the case. They can't add any exhibits or anything. The brief would be confined to legal arguments based on the evidence in the case.

MR. HOFMAN: I suppose so, your Honor. I don't know what they're going to put in it.

THE COURT: You tell them that I will accept a brief confined to the evidence and exhibits in this case and it should be filed two weeks before plaintiff's brief is due.

MR. SNIDER: Ours is the 23rd, so theirs would be the 9th.

MR. HOFFMAN: That would make it the 9th, a Friday, in January.

Okay, your Honor, I'll report that.

THE COURT: Okay.

MR. HOFFMAN: There is one last thing that I'm concerned about, your Honor, in getting back to a point [1181] that Mr. Snider made relating to what I think was marked Defendant's Exhibit J for identification, which was this rate sheet that Mr. Howard referred to.

THE COURT: The what?

MR. HOFFMAN: The rate sheet that Mr. Howard referred to when there was confusion in his testimony whether he was testifying that the rate was 8.85 percent or 8.55 percent in New York. He was questioned about whether he was accurate when he said it was 8.85 rather than 8.55.

THE COURT: Well, my recollection is that the only basis that he had for either of those figures was this document.

MR. SNIDER: That's right, your Honor.

THE COURT: He couldn't identify it and no one else could have identified it.

MR. HOFFMAN: I believe he testified that it was his understanding of what the New York rates were at the time.

THE COURT: But my recollection, and I may be wrong, is that he got that understanding from this document.

MR. HOFFMAN: Perhaps, your Honor. But I may have been mistaken. I thought the issue that we were discussing at the time was whether he was mistaken in his recollection about the 8.85, which I think your Honor found in the motion for summary judgment based on other exhibits [1182] or whether it was 8.55 based on a Citibank internal document.

If counsel will stipulate—I don't believe it is a big issue, your Honor.

If counsel will stipulate the appropriate rate is 8.85, I think that I can let the matter rest. It it is a big issue, I would ask your Honor permission to call a clerk to identify this thing as a business record.

MR. SNIDER: Oh, come on.

MR. HOFFMAN: I will represent that that's all it is and that's what Mr. Howard said. I thought in the interest of time we could proceed and I didn't think this was going to be an issue.

MR. SNIDER: Your Honor, we will not stipulate. It seems like nothing is ever over here.

THE COURT: What's the evidence in the summary judgment motion on the rate?

MR. HOFFMAN: I think some of their own exhibits, your Honor, have got the 8.85 percent that they used for Professor Dufey.

MR. FISCHLER: Your Honor—

MR. HOFFMAN: Your Honor, Mr. Howard testified that what Citibank does, as a practice, is pay 100 basis points, or one percentage point, your Honor, under quoted rates in New York.

[1183] There is evidence in the record of quoted rates in New York at the relevant time being 8.85 percent. Mr. Howard said he thought it was 8.55 percent. And that's all that issue was about.

But the plaintiff's own evidence, your Honor, that they've put in through Professor Dufey, your Honor, has these rate sheets showing a 9.85 percent for six-month CD's of $5 million in amount. Mr. Howard testifies what Citibank does is, as a practice, pay under that—100 basis points underneath whatever the quotes were. That's how he got to the 8.85 or 8.55 percent.

THE COURT: Well, it seems to me that that testimony is all you need for your argument.

MR. HOFFMAN: That's right, your Honor. So I don't think we need this sheet, and I didn't think it was a big deal, frankly, your Honor.

MR. SNIDER: Just so the testimony about the numbers on the sheet and the interest rate is stricken.

THE COURT: According to what Mr. Hoffman has just told me, that's irrelevant.

MR. SNIDER: Okay. It is still stricken, though, your Honor.

THE COURT: Yes.

MR. SNIDER: Thank you.

MR. HOFFMAN: Could I make sure that—I [1184] want to make sure that I'm not misunderstanding what's stricken.

THE COURT: It is stricken, merely the figure of 8.55.

MR. HOFFMAN: Thank you.

MR. SNIDER: Your Honor, the argument was not about whether 8.85 or 8.55 was the right number. In fact, I told Mr. Howard—I'm looking at the transcript

right now to find it, it doesn't matter to me what the number is, just tell me where the number came from.

THE COURT: I understand. But I don't think—if the number doesn't matter, it doesn't matter where it came from.

He testified that it was the Citibank's practice to get one percentage point under the—

MR. HOFFMAN: Under the bids, your Honor.

MR. SNIDER: No. He said sometimes 1 percent, sometimes 2 percent, sometimes more, sometimes all over the place.

THE COURT: That's right.

MR. SNIDER. But the fact of the record is that there is no basis at all in the record now for his testimony that he gave that either they paid or it was quoted at either 8.85 or 8.55 or anything like that.

THE COURT: No basis for his testimony as to any [1185] specific figure. And I don't believe that's relevant.

MR. SNIDER: Right. And that's what stricken, the specific figures.

THE COURT: So the specific figures are out.

MR. HOFFMAN: That's my understanding.

MR. SNIDER: Thank you, your Honor.

THE COURT: My plan is, after I read all these briefs, I will probably set the case down for oral argument at some point, although I may not. But that's my plan. And I'll arrange a convenient time for that.

MR. HOFFMAN: Yes, your Honor.

MR. McAMIS: Yes, your Honor.

(Court adjourned)

OPINION LETTER OF GREGORIO R. CASTILLO, DATED DECEMBER 17, 1987

CASTILLO, LAMAN, TAN & PANTALEON
LAW OFFICES

Singapore Airlines Building
138 H. V. De La Costa St.
Salcedo Village, Makati
Metro Manila 3117 Philippines

December 17, 1987

Brobeck, Phleger & Harrison
Spear Street Tower
One Market Plaza
San Francisco, California
U.S.A. 94105

Re: *Wells Fargo Asia Limited vs. Citibank N.A.*

Gentlemen:

This refers to your request for a further opinion on Philippine law in connection with the issues raised in the captioned case in light of the opinion of Mr. Ricardo J. Romulo, dated November 10, 1987 (the "Romulo Opinion") and the letter of Mr. Gabriel C. Singson, the Senior Deputy Governor and General Counsel of the Philippine Central Bank, dated August 13, 1987 (the "Central Bank Letter"), which Citibank, N.A. ("Citibank") seeks to submit in support of its appeal from the decision of Judge Whitman Knapp.

I am familiar with the deposits at issue in this litigation (the "Deposits") and have reviewed the confirmations exchanged by the parties. I and other attorneys in my firm working under my supervision have thoroughly researched the issue relating to the liability of Citibank,

N.A. ("Citibank") under Philippine law for the unpaid principal amount of the Deposits. I am also familiar with the Romulo Opinion and the authorities cited therein, including the Central Bank Letter.

I am a practicing attorney in the Philippines, where I was admitted to the practice of law in 1958. I was graduated with a degree of Bachelor of Laws, cum laude and class valedictorian, from the University of the Philippines, College of Law in 1957. In 1959, I obtained a Master of Laws degree from Yale University. I am the managing partner of the law firm of Castillo, Laman, Tan & Pantaleon. My firm specializes in corporation, banking, finance and commercial laws and is counsel in the Philippines for a number of local banks as well as several non-Philippine banks doing business in the Philippines, including the Wells Fargo Bank, National Association ("Wells Fargo").

I am at present a member of the American Society of International Law, The International Bar Association, and a number of professional and business organizations. I have served as special lecturer in corporate laws and finance at University of the Philippines Law Center Seminars. My areas of expertise are Corporate Law, Banking and Finance Law and Transnational Transactions. A substantial portion of my professional time is devoted to counselling clients concerning banking and finance law and the regulations formulated by the Central Bank of the Philippines to govern foreign currency transactions and the conduct of business by local banks and the branches of foreign banks in the Philippines. I also have extensive experience in the preparation of foreign currency contracts and agreements within the context of these regulations and in the problems involving foreign exchange remittance arising under those regulations.

The Standstill Telex and MAAB 47

In my earlier affidavit, I opined that MAAB 47 does not apply to the repayment of the Deposits with non-Philippine assets. That is still my opinion. Neither the Standstill Telex nor MAAB 47 (the "Decrees") applies to the repayment of Deposits (in Manila or anywhere else) with non-Philippine assets.

The authorities cited and discussed by Mr. Romulo addressed the power and authority of the government to issue the Decrees. *Rutter* vs. *Esteban* (93 Phil. 68), for example, addressed the legality of a domestic debt moratorium under the contract clause of the Philippine Constitution. None of the authorities cited by Mr. Romulo goes to the scope, as opposed to the legality of, the Decrees.

The true significance of *Rutter* vs. *Esteban* is in its reiteration of the rule that in passing upon the validity of police power statutes, "[t]he question is not whether the legislative action affects contracts incidentally or directly or indirectly, *but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end*" (93 Phil. 68 at p. 74, quoting Home Building and Loan Association vs. Blaisdell, 290 U.S. 398; underscoring provided). MAAB 47, like all rules and regulations promulgated in pursuance of or under the authority conferred by law upon the issuing administrative agency, partakes of the nature of a statute (Victoria Milling Company, Inc. vs. Social Security Commission, L-16704, March 17, 1962, 4 SCRA 627). As such, it is subject to the same rules of construction that apply to statutes. It is basic that "[a]ll statutes must be construed in the light of their purpose (Sarcos vs. Castillo, No. L-29755, January 31, 1969, 26 SCRA 853, 861; see also Bocobo vs. Estanislao, L-30458, August 31, 1976, 72 SCRA 520, 524-525).

The purpose of the Decrees and what is reasonable and appropriate to achieve it preclude a construction that MAAB 47 applies even to the repayment of the Deposits with non-Philippine assets. As Mr. Romulo himself acknowledges in his opinion (p. 6) the purpose of the Decree was to prevent the outflow of scarce foreign exchange reserves. Payment with Citibank's non-Philippine assets would not adversely affect the foreign exchange position of the Philippines (see the Central Bank Letter and the December 14, 1984 Central Bank Telex to Wells Fargo).

Under Article 10 of the Civil Code of the Philippines (Republic Act No. 386, June 18, 1949), "[i]n case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail" and Philippine courts have held that debt moratoria are not a valid exercise of police power "if they are unreasonable in the light of the circumstances occasioning their enactment" (Rutter vs. Esteban, 93 Phil. 68, 75 citing 47 Harvard Law Review, pp. 660, 661-662). If the Decrees purported to prohibit repayment with non-Philippine assets, even though such repayment did not adversely affect the foreign exchange resources of the Philippines, the Decree would be an unreasonable exercise of police power. Under Article 10, the Central Bank will not be deemed to have acted unreasonably, and the Decrees will be held not to apply to such repayment.

That such repayment is permissible is confirmed by the Central Bank Letter (which reaffirms that the purpose of the Decrees is to prevent "a net outflow of foreign exchange resources from the Philippines"), the December 14, 1984 Telex of Central Bank to Wells Fargo, and Central Bank's approval of Citibank's request to repay a portion of the Deposits using its non-Philippine assets. My conclusion is the same whether one characterizes the Decrees as "prohibiting" repayment or "suspending" repayment: the "prohibition" or "suspension" applies only to the extent of Citibank's Philippine assets.

The assertion of Mr. Romulo that "the maturities of the deposits have been extended and the obligation to repay the deposits has been deferred" (Romulo Opinion, p. 15) finds no basis in the Decrees. The Standstill Telex was a mere request (with respect to the private sector obligations) to the lenders to roll over the debt. The lenders were not legally obliged to agree to the request. Although the Central Bank has implemented procedures to monitor compliance with the terms of the Standstill Telex by Philippine borrowers and banks and financial institutions, there is no existing law which compels the lender to comply with the request. MAAB 47 itself merely requires the prior approval of the Central Bank of any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions.

By their terms, the Decrees do not flatly prohibit or suspend payment; they merely require prior Central Bank approval. This is confirmed by the Central Bank Letter wherein the Central Bank states that the Decrees temporarily suspended payment "except to the extent the Central Bank authorized payment."

Citibank does not even need to ask for permission to pay with non-Philippine assets since, as explained in 6 and 7 above, the Decrees do not apply to such repayment. But if there is any doubt as to whether such repayment is prohibited or suspended, Citibank must ask for Central Bank approval to repay with such assets. Article 1159 of the Civil Code provides that "obligations arising from contracts have the force of law between the parties and shall be complied with in good faith." Parties "are bound not only to the fulfillment of what has been expressly stipulated but also to consequences which according to their nature, may be in keeping with good faith, usage and law" (Article 1315, Civil Code).

Central Bank approval will be granted if the proposed repayment is not inconsistent with the purpose of the

Decrees, as where repayment is made with non-Philippine assets. That such approval would be granted is confirmed by the Central Bank's Telex to Wells Fargo of December 14, 1984, and Central Bank's approval of Citibank's request to repay a portion of the Deposits using its non-Philippine assets.

In contrast, a moratorium, as this is understood in Philippine law, "is a postponement of fulfilment of obligations decreed by the state through the medium of courts or the legislature" (Rutter vs. Esteban, 93 Phil. 68, 72). The law subject of the case of *Rutter* vs. *Esteban*, namely, Republic Act No. 342 (July 26, 1948), was considered moratory because it provided that all debts and other monetary obligations payable to private parties within the Philippines originally incurred or contracted before December 8, 1941, and still remaining unpaid . . . *shall not be due and demandable for a period of eight years from and after settlement of the war damage claim of the debtor by the United States Philippine War Damage Commission*" (underscoring ours).

The Decree could not have, in the words of Mr. Romulo, "extended the maturity of Citibank's obligations to repay the deposit in this case" (Romulo Opinion, p. 1),[1] for the reason that, far from suspending the obligation itself to repay, or suspending its demandability, the Decrees merely require prior Central Bank approval for

[1] The case of PAFLU vs. Bureau of Labor Relations, 72 SCRA 396, 402 (1976), which Mr. Romulo cites (see footnote no. 2, Romulo Opinion) holds that "[c]ourts will and should respect the contemporaneous construction placed upon the statute by the executive officers whose duty it is to enforce it, and unless such interpretation is clearly erroneous will ordinarily be controlled thereby." In Tayug Rural Bank vs. Central Bank of the Philippines, No. L-46158, November 28, 1986, 146 SCRA 120, 130, the Supreme Court made it clear, however, that "administrative interpretation of the law is at best merely advisory, for it is the courts that finally determine what the law means."

repayments using Philippine assets. They do not apply to repayments with non-Philippine assets.

In any event, the assertion in the Romulo Opinion that "the maturities of the WFAL Deposits have been extended and Citibank's obligation to repay WFAL is not yet due" does not change my opinion as stated in my original affidavit. This assertion fails to take into account the scope and purpose of the Decrees. The purpose of MAAB 47 is to stem the outflow of foreign exchange. The purpose of the legislation described in the *Rutter* case cited by Mr. Romulo was to stimulate economic recovery by permitting borrowers to postpone the repayment of debts. While the latter requires a general suspension of the maturities of debts, the former need only prevent borrowers from "remitting" foreign exchange. No suspension of debts is required for the objective is not affected by repayment with non-Philippine assets.

Obligation to Pay with Non-Philippine Assets

Under Philippine contract law, Citibank's obligation under the Deposit contracts is not limited to the assets of its Manila branch; a depositor may look to any of a bank's assets, wherever located, for repayment of a deposit.

The fact that the Decrees do not require such repayment (see the Central Bank Letter) does not mean that Citibank is not obligated to do so either as a matter of law or contract. Under Article 2236 of the Civil Code, "the debtor is liable with all his property, present and future for the fulfillment of his obligations, subject to the exemptions provided by law."

Under Article 1980 of the Civil Code, "[f]ixed, savings and current deposits shall be governed by the provisions of a simple loan." By a contract of simple loan,

"one of the parties delivers money or other consummable thing, upon the condition that the same amount of the same kind and quality shall be paid." (Article 1933, Civil Code) The relationship between Citibank and Wells Fargo, in the words of the Supreme Court in ***Guingona, Jr.*** vs. *City Fiscal of Manila* (G.R. No. L-60033, April 4, 1984, 128 SCRA 577, 585), is "that of creditor and debtor; consequently, the ownership of the amount deposited was transmitted to the Bank upon the perfection of the contract and it can make use of the amount deposited for its banking operations, such as to pay interests on deposits and to pay withdrawals." According to the Supreme Court, "while the Bank has the obligation to return the *amount deposited*, it has, however, no obligation to return or deliver the *same money* that was deposited" (*Id.*).

In an earlier case, the Supreme Court held that:

> "The word 'loan,' however, as used in the statute, has a technical meaning. It never means the return of the same thing. It means the return of an equivalent only, but never the same thing loaned. A 'loan' has been properly defined as an advancement of money, goods or credits upon a contract or stipulation to repay, not to return, the thing loaned at some future day in accordance with the terms of the contract. Under the contract of 'loan' as used in said statute, the moment the contract is completed, the money, goods or chattels given cease to be the property of the former owner and become the property of the obligor to be used according to his own will, unless the contract itself expressly provides for a special or specific use of the same. At all events, the money, goods or chattels, the moment the contract is executed, cease to be the property of the former owner and becomes the absolute property of the obligor" (Tolentino and Manio vs. Gonzalez Sy Chiam, 50 Phil. 558, 575).

Accordingly, repayment by Citibank of the Deposits with the use of its non-Philippine assets is not, contrary to Mr. Romulo's contention (Romulo Opinion, p. 12), performance of an obligation other than in a "normal manner." It is payment that is consistent with the legal characterization of a bank deposit as a simple loan and with the legal obligation of the debtor to answer with all his property, present and future.

Considering that the obligation of a bank under a deposit contract is not to return the very same funds deposited, but rather to repay funds of the same kind and amount, the funds to repay a deposit need not be funds booked at the same branch that booked the deposit. Rather, under Philippine law, a depositor may look to any of the bank's assets, wherever located for repayment of a deposit (Article 2236, Civil Code). In short, under Philippine law, Citibank's obligation to repay the Deposits is *not* limited to the assets booked at its Manila branch.

Since Citibank's obligation is to repay an equal amount of the currency deposited, and not the same money or notes which Wells Fargo deposited, Citibank's obligation is to deliver a generic thing. Under Philippine law, a generic thing is one that is indicated only by its kind, without being designated and distinguished from others of the same kind. In the obligation to deliver a generic thing, the object due is *determinable*; the moment it is delivered, it becomes determinate. Unless otherwise limited, the obligation to deliver a generic or indeterminate thing is not confined to the objects which the debtor may own or possess at the moment. He may consume or dispose of the things pertaining to him, so long as he can procure others of average quality for delivery (4 Tolentino, Commentaries and Jurisprudence on the Civil Code of the Philippines, 86 [1973]). A determinate or specific thing, on the other hand, is one that is individualized and can be identified or distinguished from others of its kind.

Article 1263 of the Civil Code provides that—

> "In an obligation to deliver a generic thing, the loss or destruction of anything of the same kind does not extinguish the obligation."

It is understood that the thing is lost when it perishes, goes out of commerce, or disappears in such a way that its existence is unknown or it cannot be recovered (Civil Code, Art. 1189, par. [2]). Citibank's obligation is to repay Wells Fargo in U.S. Dollars, and there is no claim on Citibank's part that U.S. Dollars have "disappeared," or that they have "gone out of commerce."

When I stated that Citibank's obligation under the Deposit contracts is not limited to the assets of its Manila branch, and that a depositor may look to any of its assets, wherever located for repayment of a deposit, it was not to indorse a view that Philippine law purports "to reach the global assets of Citibank" and to extend the "limited reach of a Philippine court in enforcing an order of attachment of property outside the Philippines" in disregard of the ruling in *Time, Inc.* vs. *Reyes*, No. L-28882 (May 31, 1971, 39 SCRA 303). In this case, it was held that "no state can by its laws, and no court (which is only a creature of the state) can, by its judgments or decisions, directly bind or affect property or persons beyond the limits of the state."

In decreasing that "the debtor is liable with . . . all his property for the fulfillment of his obligations . . ." (Article 2236, Civil Code), Philippine law merely defines what the rights of a creditor are and the extent of the debtor's corresponding liability. It does not pretend to expand the state's judicial and enforcement jurisdiction beyond its borders, authorize the execution of any judgment or order of attachment on property outside of the Philippines, or authorize the performance of any official act outside of its territory.

How such rights may be asserted or against whom such liabilities may be enforced outside of the Philippines, either by the institution of proceedings for the enforcement of a Philippine judgment or of an original action commenced abroad for the satisfaction of the creditor's claims, is a matter that Articles 1933, 1953, 1980 and 2236 of the Civil Code do not address.

Indeed, if *Times, Inc.* vs. *Reyes* is to have any significance in this case, it is in supporting my conclusion that the Decrees cannot bind or affect any property or person abroad, and for that reason, cannot be given a construction that would subject to regulation any repayment made either in the Philippines or elsewhere that uses non-Philippine assets.

Very truly yours,

/s/ Gregorio R. Castillo
GREGORIO R. CASTILLO

TELEX DATED DECEMBER 8, 1983 FROM A.M.V. JALANDONI TO CLAY COWL/SIMON TAN

WELLS ASIA LTD

ATTN CLAY COWL/SIMON TAN

GENTLEMEN:

RE: PHILIPPINE MORATORIUM AND CITIBANK MANILA'S BORROWINGS

AS DISCUSSED OVER THE PHONE, WE HAVE NO ALTERNATIVE AT THE PRESENT TIME BUT TO SEEK A 90 DAY ROLLOVER OF YOUR MATURING PLACMENTS WITH US DUE ON DECEMBER 9 FOR US DOLLAR 1 MM AND ON DECEMBER 12 FOR US DOLLAR 1 MM.

AS YOU KNOW, ON OCTOBER 17, THE GOVERNMENT OF THE PHILIPPINES REQUESTED FOR A 90 DAY MORATORIUM ON ALL EXTERNAL DEBTS, WHICH INCLUDED THE LIABILITIES OF PHILIPPINE BRANCHES OF FOREIGN BANKS, I.E. CITIBANK MANILA.

IN OUR DISCUSSION, YOU MENTIONED THAT YOU WERE ABLE TO WITHDRAW YOUR PLACEMENTS FROM OTHER MONEY CENTER BANKS DOMICILED IN THE PHILIPPINES, DESPITE THE MORATORIUM. YOU MAY HAVE DEALT/PLACED WITH AN OFFSHORE BANKING UNIT (OBU). THE OBU'S LIABILITIES WERE NOT COVERED BY THE MORATORIUM.

WE ARE VERY MUCH INVOLVED WITH THE ADVISORY COMMITTEE THAT IS NEGOTIATING THE RESTRUCTURING OF THE PHILIPPINE EXTERNAL DEBT. FOR THIS REASON, WE ARE VERY

SENSITIVE ABOUT ANY OF OUR ACTIONS THAT MIGHT BE CONSTRUED AS VIOLATIVE OF THE SPIRIT OF THE MORATORIUM. AFTER THE RESTRUCTURING IS OVER, WE MIGHT HAVE MORE FLEXIBILITY IN FINDING WAYS TO AMELIORATE THE SITUATION YOU FIND YOURSELVES IN.

IN THE MEANTIME, MAY WE REITERATE OUR REQUEST TO ROLLOVER YOUR MATURING PLACEMENTS FOR ANOTHER 90 DAYS.

VERY TRULY YOURS,

A. M. V. JALANDONI

CC: V. N. MANAGAS
F. G. TARRIELA
S. S. CIPRIANO
A. B. LIRIO

THIRTEEN TELEXES DATED DECEMBER 1983 TO APRIL 1984 FROM CITIBANK, N.A. TO BANKS HAVING FUNDS ON DEPOSIT WITH CITIBANK, N.A.'S MANILA BRANCH

February 3, 1984

Treasury

A.M.V. JALANDONI, VP

TO : BANK OF MONTREAL SINGAPORE

ATTN : CITIBANK MANILA

RE : YOUR US $8 MM PLACEMENT WITH CITIBANK MANILA DUE 1/26/84

We would like to follow up our request to renew the above mature borrowing(s) for another three months. We reiterate our willing to repay you but that at the present time we cannot pay without violating the 90 day standstill agreement which has been extended to April 16, 1984. Further, we are willing to pay a 1 1/8% premium over the prevailing three month LIBO to reflect the Philippine Foreign sovereign risk you are taking.

We look forward to your positive response to our request.

A. M. V. JALANDONI/V. N. NARAGAS

VP-Treasury /VP-F I D

CABLE DISPATCH

CONFIDENTIAL

January 31, 1984
Treasury

Branch 400

A.M.V. Jalandoni, V.P.
Signature

TO	:	MITSUI LONDON
ATTN	:	EURODOLLAR DESK
FROM	:	CITIBANK MANILA JAN. 31, 1984
RE	:	YOUR PLACEMENT WITH CITIBANK MANILA FOR $5 MM DUE 2/14/84 $5 MM DUE 2/15/84

As you know, on October 17, 1983, the government of the Philippines requested for a 90 day moratorium on all external debts, which included the liabilities of Phil. branches of foreign banks, i.e. Citibank, Manila. The pertinent provision on the October 15 telex is Section 11 which relates to borrowings of Philippine branches of foreign banks as included in the private financial sector category. These loans were requested to be rolled over for a 90 day period.

We wish to inform you that the government of the Philippines has extended the moratorium for another 90 days from the original maturity to April 16, 1984. We also wish to state that Citibank Manila operates as a domestic commercial bank with a foreign currency deposit unit license, and as such is covered under the moratorium as against offshore banking units, which are, by definition, not covered by the moratorium.

While Citibank/Citicorp remains responsible for commitments made by offshore branches, these branches operate

within various countries, and as such are subject to the country's laws, regulations, and promulgations. When these statutes prevent Citibank branches from making good on its commitmemt, the institution as a whole does not consider this as a breach of the bank's commitment for which Citibank/Citicorp is not responsible for.

Thus, in Citibank Manila's case, we wish to reiterate our willingness to pay our obligations, but that we cannot at the present time pay without violating the 90-day standstill agreement.

We, therefore, have no alternative at the present time but to request a renewal of above borrowing(s) from you for another 91 days from said maturity(ies). We will —— you the interest when due to keep said borrowing current. Further, we are willing to pay a 1⅛% premium over the prevailing 3 month LIBO to reflect the Philippine sovereign risk you are taking.

We look forward to your positive response to our request.

A.M.V. JALANDONI/V.N. NARAGAS
VP Treasury /VP-FID

CABLE DISPATCH

CONFIDENTIAL

Jan. 31, 1984

Treasury

BRANCH 400

A.M.V. JALANDONI, VP
SIGNATURE

TO : MITSUI NEW YORK

ATTN : EURODOLLAR DESK

FROM : CITIBANK MANILA
JAN. 31, 1984

RE : YOUR PLACEMENTS WITH CITIBANK MANILA FOR
$9.2 MM DUE 2/9/84
$13.4 MM DUE 2/15/84
$9.4 MM DUE 2/22/84
[ILLEGIBLE]

As you know, on [ILLEGIBLE], the government of the Philippines requested for a 90 day moratorium on all external debts, which included the liabilities of Phil. branches of foreign banks, i.e. Citibank, Manila. The pertinent provision on the October 15 telex is Section 11 which relates to borrowings of Philippine branches of foreign banks as included in the private financial sector category. These loans were requested to be rolled over for a 90 day period.

We wish to inform you that the government of the Philippines has extended the moratorium for another 90 days from the original maturity to April 16, 1984. We also wish to state that Citibank Manila operates as a domestic commercial bank with a foreign currency deposit unit license, and as such is covered under the moratorium as against offshore banking units, which are, by definition, not covered by the moratorium.

While Citibank/Citicorp remains responsible for commitments made by offshore branches, these branches operate within various countries, and as such are subject to the country's laws, regulations, and promulgations. When these statutes prevent Citibank branches from making good on its commitment, the institution as a whole does not consider this as a breach of the bank's commitment for which Citibank/Citicorp is not responsible for.

Thus, in Citibank Manila's case, we wish to reiterate our willingness to pay our obligations, but that we cannot at the present time pay without violating the 90-day standstill agreement.

We, therefore, have no alternative at the present time but to request a renewal of above borrowing(s) from you for another 91 days from said maturity(ies). We will —— you the interest when due to keep said borrowing current. Further, we are willing to pay a 1⅛% premium over the prevailing 3 month LIBO to reflect the Philippine sovereign risk you are taking.

We look forward to your positive response to our request.

A.M.V. JALANDONI/V.N. NARAGAS
VP Treasury /VP-FID

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TO: SOCIETE GENERALE NY IBF

ATTN: EURODESK

FROM: CITIBANK MANILA
JANUARY 30, 1984

RE: YOUR US DOLLAR PLACEMENT WITH CITIBANK MANILA FOR US DOLLAR 5 MM DUE ON MARCH 5, 1984

As you know, on October 17, 1983, the government of the Philippines requested for a 90 day moratorium on all external debts, which included the liabilities of Phil. branches of foreign banks, i.e. Citibank, Manila. The pertinent provision on the October 15 telex is Section 11 which relates to borrowings of Philippine branches of foreign banks as included in the private financial sector category. These loans were requested to be rolled over for a 90 day period.

We wish to inform you that the government of the Philippines has extended the moratorium for another 90 days from the original maturity to April 16, 1984. We also wish to state that Citibank Manila operates as a domestic commercial bank with a foreign currency deposit unit license, and as such is covered under the moratorium as against offshore banking units, which are, by definition, not covered by the moratorium.

While Citibank/Citicorp remains responsible for commitments made by offshore branches, these branches operate within various countries, and as such are subject to the country's laws, regulations, and promulgations. When these statutes prevent Citibank's branches from making good on its commitment, the institution as a whole does not consider this as a breach of the bank's commitment for which Citibank/Citicorp is not responsible for.

Thus, in Citibank Manila's case, we wish to reiterate our willingness to pay our obligations, but that we cannot at the present time pay without violating the 90-day standstill agreement.

We, therefore, have no alternative at the present time but to request a renewal of above borrowings from you for another 91 days from said maturity. We will pay you the interest when due to keep said borrowing current. Further, we are willing to pay 1⅛% premium over the prevailing 3 month LIBO to reflect the Philippine sovereign risk you are taking.

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TO: BANCA COMMERCIALE ITALIANA— ABU DHABI

EURODESK

FROM: CITIBANK MANILA 3/19/84

RE: YOUR US DOLLAR 5 MILLION PLACEMENT WITH CITIBANK MANILA DUE ON 3/19/84

WITH REFERENCE TO OUR JANUARY 31, 1984 AND MARCH 15, 1984, WE WISH TO REITERATE OUR WILLINGNESS TO REPAY OUR MATURING BORROWING OF US DOLLAR 5MM DUE ON 3/19/84, BUT THAT WE CANNOT DO SO WITHOUT VIOLATING THE MORATORIUM STOP WE WILL REPAY THE INTEREST DUE OF USO 232,916.67 ON 3/19/84 STOP WE ARE PRESENTLY MAKING REPRESENTATIONS WITH THE CENTRAL BANK ON THE ISSUE OF THIRD PARTIES BORROWINGS, AND WILL ADVISE YOU UPON RECEIPT OF CENTRAL BANK APPROVAL TO REPAY 45 PCT. OF OUR THIRD PARTY BORROWINGS STOP IN THE MEANTIME, WE REITERATE OUR REQUEST TO RENEW THE ABOVE PRINCIPAL AMOUNT FOR ONE WEEK VALUE 3/19 TO 3/26 STOP AS YOU KNOW WE HAVE BEEN GENERALLY PAYING A PREMIUM OF 1⅛ PCT OVER INTERBANK RATES TO REFLECT PHILIPPINE SOVEREIGN RISK, AND WE ARE OFFERING TO PAY YOU THE SAME PREMIUM STOP PLEASE TELEX

REPLY TO 63732 OR 64464 ATTENTION A.M.V. JALANDONI/S.S. CIPRIANO STOP THANKS AND REGARDS FULLSTOP

SANDY CIPRIANO/EURODESK
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TO	:	BANCA NAZIONALE DELL AGRICULTURA—NEW YORK
ATTN	:	EURODESK
FROM	:	CITIBANK MANILA
RE	:	YOUR US DOLLAR 10 MILLION PLACEMENT WITH CITIBANK MANILA DUE 3/6/84

WITH REFERENCE TO OUR TELEXES DATED 1/31/84 AND 3/2/84, WE WISH TO REITERATE OUR WILLINGNESS TO REPAY OUR MATURING BORROWING OF US DOLLAR 10,000,000.00 DUE ON 3/6/84, BUT THAT WE CANNOT DO SO WITHOUT VIOLATING THE MORATORIUM STOP WE WILL REPAY THE INTEREST DUE OF USD 425,173.41 ON 3/6/84 STOP WE ARE PRESENTLY MAKING REPRESENTATIONS WITH THE CENTRAL BANK ON THE ISSUE OF THIRD PARTY BORROWINGS, AND WILL ADVISE YOU ACCORDINGLY STOP IN THE MEANTIME, WE REITERATE OUR REQUEST TO RENEW THE ABOVE PRINCIPAL AMOUNT FOR ONE WEEK VALUE 3/6/84 TO 3/13/84 STOP PLEASE TELEX REPLY TO 63732 OR 64464 ATTENTION A.M.V. JALANDONI/S.S. CIPRIANO STOP THANKS AND REGARDS FULLSTOP

SANDY CIPRIANO/EURODESK
63732 CITIBK PN

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TO	:	BANGKOK BANK LONDON
ATTN	:	EURODESK
FROM	:	CITIBANK MANILA 4/26/84
RE	:	YOUR US DOLLAR 3,000,000 PLACEMENT WITH CITIBANK MANILA DUE ON 4/24/

THIS IS TO CONFIRM RENEWAL OF OUR BORROWING FROM YOU OF USDLRS 1,599,000 IN THE NAME OF CITIBANK MANILA REPRESENTING THE BALANCE OF THE ABOVE CAPTIONED DEPOSIT AFTER REPAYMENT OF THE 46.7 PCT VALUE 4/24/84 to 5/1/84 AT 11 7/8 PERCENT (INTERBANK RATE OF 10 3/4 PLUS 1 1/8 PREMIUM) WITH NO MOVEMENT OF FUNDS FOR NEW PRINCIPAL AMOUNT STOP ON 4/24 WE REPAID INTEREST DUE STOP ON 4/24 WE REPAID FOR GOOD VALUE 4/24/84 USDLRS 1,481,000 REPRESENTING THE 46.7PCT OF ORIGINAL PRINCIPAL AMOUNT AS INSTRUCTED STOP PLEASE CABLE CONFIRMATION UPON RECEIPT OF FUNDS STOP WE WISH TO REITERATE OUR WILLINGNESS TO REPAY THE REMAINING BALANCE AT MATURITY BUT THAT WE CANNOT DO SO WITHOUT VIOLATING THE MORATORIUM STOP WE WILL CONTINUE TO REQUEST RENEWAL FOR THE NEW PRINCIPAL AMOUNT UNTIL SUCH TIME WE ARE

ALLOWED TO REPAY STOP THANKS AND
REGARDS

JALANDONI/CIPRIANO

*88124488KBANK G
14732 TGROUP PS

HOW PLSAAAAA

. . . . . .
*003.6

[TOP PORTION OF TELEX ILLEGIBLE]

January 6, 1984

Treasury

400

A.M.D. LIRIO ——

TO : BANKAMERICA INTERATIONAL
BANK OF AMERICA NY, ——

ATTN : A. CUNNINGHAM, AVF-NEW YORK
TRADING CENTER

FROM : CITIBANK MANILA

RE : *OUR BORROWING FOR US$5 MIL
DUE ON DEC. 30/83*

WE WISH TO EXPRESS OUR WILLINGNESS TO PAY OUR MATURED BORROWING, BUT THAT WE CANNOT DO SO WITHOUT VIOLATING THE 90 DAY STANDSTILL AGREEMENT.

JUST LIKE YOUR MANILA BRANCH, CITIBANK MANILA OPERATES AS A DOMESTIC COMMERCIAL BRANCH WITH A FOREIGN CURRENCY DEPOSIT UNIT LICENSE AND AS SUCH ARE COVERED BY THE MORATORIUM AS AGAINST OFFSHORE BANKING UNITS WHICH ARE BY DEFINITION NOT COVERED BY THE MORATORIUM AGREEMENT.

WE THEREFORE REITERATE OUR REQUEST TO ROLLOVER OUR MATURING BORROWING FOR US$5MIL VALUE DECEMBER 30, 1983 FOR 91 DAYS TO MATURE ON MARCH 30, 1984, WE LOOK FORWARD TO YOUR POSITIVE RESPONSE.

BEST REGARDS.

AMV JALANDONI/— NARAGAS
VP TREASURY

CC: AMD LIRIO, EURODOLLAR DESK

TO : BANK OF HAWAII NASSAU

ATTN : EURODESK/WILLIAM K. LEE
VP INTERNATIONAL BANKING
DIVISION

FROM : CITIBANK MANILA 3/19/84

RE : YOUR US DOLLAR 2,000,000 PLACEMENT WITH CITIBANK MANILA DUE ON 3/19/84

WITH REFERENCE TO YOUR TELEX DATED MARCH 16, 1984 THIS IS TO CONFIRM RENEWAL OF OUR BORROWING FROM YOU OF USD 2,000,000 IN THE NAME OF CITIBANK MANILA VALUE 3/19/84 TO 3/24/84 AT 11 5/16 PCT. WITH NO MOVEMENT OF FUNDS FOR SAID PRINCIPAL AMOUNT STOP ON 3/19 WE WILL REPAY INTEREST DUE AS INSTRUCTED STOP WE WISH TO REITERATE THAT, AS STATED IN OUR JANUARY 31, 1984 CABLE TO YOU, CITIBANK IS A DOMESTIC COMMERCIAL BANK WITH A FOREIGN CURRENCY DEPOSIT UNIT (FCDU) LICENSE, AND AS SUCH IS COVERED BY THE MORATORIUM, AS AGAINST OFFSHORE BANKING UNITS (OBU) WHICH BY DEFINITION ARE NOT COVERED BY THE MORATORIUM STOP WE ALSO REITERATE OUR WILLINGNESS TO REPAY SAID BORROWING BUT THAT WE CANNOT DO SO AT THE PRESENT TIME WITHOUT VIOLATING THE MORATORIUM STOP AS YOU KNOW, WE HAVE MADE REPRESENTATION WITH THE CENTRAL BANK TO REPAY 45 PCT. OF OUR THIRD PARTY BORROWINGS, AND WE WILL ADVISE YOU ACCORDINGLY OF ANY DEVELOPMENTS STOP REGARDS FULLSTOP

JALANDONI/CIPRIANO

CC: BUTCH BONOAN, BANK OF HAWAII,
MANILA OBU

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HI PALS RECEIVED WELL++

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WUI 12/27 8382
62642 MARGREXBI
63732 CITIBK PN

TO	:	MARINE MIDLAND BANK NYIBF
ATTN	:	EURO DOLLAR DESK
FROM	:	CITIBANK MANILA
RE	:	OUR BORROWING FROM YOU OF US DLR 15,000,000.00 DUE ON DECEMBER 27, 1983

AS YOU KNOW, ON OCTOBER 17 THGE GOVERNMENT OF THE PHILIPPINES REQUESTED FOR A 90 DAY MORATORIUM ON ALL EXTERNAL DEBTS, WHICH INCLUDE PODE 8TH TL LIABILITIES OF PHIL. BRANCHES OF FOREIGN BANKS. I. E. CITIBANK MANILA. THE PERTINENT PROVISION ON OCTOBER 15 TELEX IS SECTION 11 WHICH RELATES TO BORROWINGS OF PHIL. BRANCHES OF FOREIGN BANKS AS INCLUDED IN THE PRIVATE FINANCIAL SECTOR CATEGORY. THESE LOANS WERE REQUESTED TO BE ROLLED OVER FOR A 90 DAY PERIOD.

WE WISH TO REITERATE THAT WE WISH TO STATE THAT CITIBANK MANILA OPERATES AS A DOMESTIC COMMERCIAL BRANCH WITH A FOREIGN CURRENCY DEPOSIT UNIT LICENSE ANNS AND AS SUCH ARE COVERED UNDER THE MORATORIUM AS AGAINST OFFSHORE BANKING UNITS WHICH ARE, BY DEFINITION, NOT COVERED BY THE MORATORIUM AGREEMENT.

FURTHER, WE WISH TO REITERATE OUR WILLINGNESS AND INTENT TO PAY OUR

OBLIGATIONS BUT THAT WE CANNOT, AT THE PRESENT, PAY WITHOUT VIOLATING THE 90 DAY STANDSTILL AGREEMENT.

WE, THEREFORE, HAVE NO ALTERNATIVE AT THE PRESENT TIME BUT TO REQUEST A RENEWAL OF THE ABOVE BORROWING FROM YOU FOR 91 DAYS TO MATURE MARCH 27, 1984. WE LOOK FORWARD TO YOUR POSITIVE RESPONSE TO OUR REQUEST.

A. M. V. JALANDONI/V. N. NARAGAS
VP—TREASURY / VP—F I D

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62642 MARGREXB .....
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12/27 1610

25137616++
63732 CITIBK PN
00677
197616 MD FX

DEC 28 83

TO : MARYLAND NATIONAL BANK
NASSAU
FROM : CITIBANK MANILA
ATTN : EDWARD D. PRINCE/EURODOLLAR
DESK
RE : YOUR PLACEMENT OF USD 5 MLN
DUE ON DEC 30TH 83

AS YOU KNOW, ON OCT 17TH THE GOVERNMENT OF THE PHILIPPINES REQUESTED FOR A 90-DAY MORATORIUM ON ALL EXTERNAL DEBTS, WHICH INCLUDED THE LIABILITIES OF PHILIPPINE BRANCHES OF FOREIGN BANKS, I.E. CITIBANK MANILA. THE PERTINENT PROVISION ON THE OCT 15 TELEX IS SECTION 11 WHICH RELATES BORROWINGS OF PHILIPPINE BRANCHES OF FOREIGN BANKS AS INCLUDED IN THE PRIVATE FINANCIAL SECTOR CATEGORY, THESE LOANS, WERE REQUESTED TO BE ROLLED OVER FOR A 90 DAY PERIOD.

WE WISH TO STATE THAT CITIBANK MANILA OPERATES AS A DOMESTIC COMMERCIAL BRANCH WITH A FOREIGN CURRENCY DEPOSIT UNIT LICENSE AND AS SUCH ARE COVERED UNDER THE MORATORIUM AS AGAINST OFFSHORE BANKING UNITS WHICH ARE, BY DEFINITION NOT COVERED BY THE MORATORIUM AGREEMENT.

FURTHER, WE WISH TO REITERATE OUR WILLINGNESS AND INTENT TO PAY OUR

OBLIGATIONS BUT THAT WE CAN NOT, AT PRESENT, PAY WITHOUT VIOLATING THE 90 DAY STANDSTILL AGREEMENT.

WE THEREFORE HAVE NO ALTERNATIVE AT THE PRESENT TIME BUT TO REQUEST A RENEWAL OF THE ABOVE BORROWING FROM YOU FOR 91 DAYS TO MATURE ON MARCH 30TH, 1984. WE LOOK FORWARD TO YOUR POSITIVE RESPONSE TO OUR REQUEST.

A.M.V. JALANDONI/V.N. NARAGAS
VP—TREASURY
VP—FID
CITIBANK MANILA
TELEX NBR: 63732 CITIBK PN
JFRIENDS CAN
FRIENDS CAN WE PLS EXPECT YOUR REPLY THIS AFTERNOON PERHAPS PLS?
AGREED WILL GET BACK++
OK THX BIFN+
197616 MD FX

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12/29 0045

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63732 CITIBK PN
07248
OUBANK-RS24575
63731 CITIBK PN

TO : OVERSEAS UNION BANK OF SINGAPORE

ATTN : EURODOLLAR DESK

RE : OUR BORROWING FOR USDLRS 2 MIO DUE JAN 24 84

AS YOU KNOW ON OCTOBER 17, THE GOVERNMENT OF THE PHILIPPINES REQUESTED FOR 1 A 90 MORATORIUM ON ALL EXTERNAL DEBTS. WHICH INCLUDED THE LIABILITIES OF PHILIPPINE BRANCHES OF FOREIGN BANKS, I.E., CITIBANK MANILA. SAID 90-DAY MORATORIUM WAS SUBSEQUENTLY EXTENDED FOR ANOTHER 90 DAYS. THE PERTINENT PROVISION ON OCTOBER 15 TELEX IS SECTION 11 WHICH RELATED TO BORROWINGS OF PHILIPPINE BRANCHES OF FOREIGN BANKS AS INCLUDED IN THE PRIVATE FINANCE SECTOR CATEGORY. THESE LOANS WERE REQUESTED TO BE ROLLED OVER FOR A 90 DAY PERIOD.

WE WISH TO STATE THAT CITIBANK MANILA OPERATES AS A DOMESTIC COMMERCIAL BANK WITH FOREIGN CURRENCY — DEPOSIT UNIT LICENSE AND SUCH IS COVERED UNDER THE MORATORIUM.

FURTHER, WE WISH TO REITERATE OUR WILLINGNESS AND INTENT TO PAY OUR OBLIGATIONS BUT THAT WE CANNOT, AT THE PRESENT, PAY WITHOUT VIOLATING THE 90 DAY STANDSTILL AGREEMENT.

WE, THEREFORE, HAVE NO ALTERNATIVE AT THE PRESENT TIME BUT TO REQUEST A RENEWAL OF THE ABOVE BORROWING FROM YOU FOR 91 DAYS TO MATURE ON APRIL 24, 1984. WE LOOK FORWARD TO YOUR POSITIVE RESPONSE TO OUR REQUEST.

A.M.V. JALANDONI/A.M.D. LIRIO

63732 CITIBK PN
OUBANK RS24575

HOW RECEIVED PSE?

OK SIR

IF YOU HAVE FURTHER QUERIES PSE CALL ABOVE TKS AND BFN

63731 CITIBK PN . . . . . .
005.6 MINS

Thomas C. Thesbold
Vice Chairman

CITIBANK

April 19, 1984

Dr. Franz Lutolf
General Manager
Swiss Bank Corporation
Paradeplatz 6
CR-8822, Zurich, Switzerland

Dear Mr. Lutolf

I am sorry for this belated reply to your March 14 letter relating to the $4.5 million deposit placed by Swiss Bank Corporation with our Manila branch.

We have, of course, had several discussions with your Bank concerning this deposit. We regret that economic conditions in the Philippines have caused the government to take action which has prevented our Manila branch from repaying your Bank's deposit at this time.

As you may be aware, Philippine bank regulations have provided for three fundamental types of units for banks operating there. These are (1) full branch status, (2) foreign currency deposit units ("FCDUs"), and (3) offshore banking units ("OBUs"). Citibank has maintained branches in the Philippines for many years. Citibank has also for many years maintained an FCDU. Citibank has never maintained an OBU in the Philippines. All three types of banking entities in the Philippines may, in varying circumstances, accept foreign currency deposits and both FCDUs and OBUs may legitimately be characterized as carrying on, in varying degrees, an "offshore" business. If Citibank Manila's telex did cause any confusion in this regard, we sincerely regret it.

The significant point would appear to be not whether an FCDU is "offshore" or "local", but whether or not the host government has blocked payment by FDCUs. There

was simply no reason to anticipate the standstill request of the Central Bank, but even more so, there was no reason to anticipate that this standstill and its implementing local blocking regulations would apply to interbank deposits with FCDUs as well as local branch deposits.

MEMORANDUM TO THE FILES FROM
S.S. CIPRIANO

October 24, 1983

MEMORANDUM TO : THE FILES

RE : *Payment Of Principal On Maturing Dollar Obligations*

In an effort to maintain liquidity in the event of a credit crunch in the area, we embarked on a pre-funding strategy. Our objective was to borrow from banks ahead of our foreign currency funding requirements in November, and use these pre-borrowings to replace current funding from branches as they mature.

The following are the details of said borrowings:

Dealing Date	Value Date	Amount Borrowed	Maturity Date
October 13, 1983	October 17, 1983	$ 37 MIO	April 17, 1984
October 14, 1983	October 18, 1983	$ 40 MIO	May 18, 1984
October 14, 1983	October 18, 1983	$ 10 MIO	June 18, 1984
October 17, 1984	October 19, 1983	$ 20 MIO	January 19, 1984
	TOTAL	$107 MIO	

The above borrowings increased the total outstandings of Their Accounts Banks-Foreign (TBF) from $622,000,308.56 as of October 14, 1983 to $727,000,058.56 as of October 21, 1983.

On October 24, 1983, we had maturing borrowings of $10 MIO from Citi-Brussels and $45 MIO from Citi-London. In conjunction with our prefunding strategy, and taking due care we were within the guidelines of MAAB 47, we repaid said borrowings. In an informal meeting with A.M.V. Jalandoni and J. R. S. Lacsamana, MAAB 47 was interpreted to mean that repayments of principal amounts on foreign obligations to foreign banks financial institutions were allowable as long as the total obligations to said institutions shall not be reduced from

the stipulated October 14 level of $1,082,133,720.11. After repayments of the $55 MIO maturing borrowings, total US dollar outstanding obligations as of October 24 was $1,131,129,630.90. — in the —— that Central Bank disagrees with the above interpretation of MAAB 47, we will reborrow from the branches the amounts that have been paid.

(illegible)	(illegible)
S. S. CIPRIANO	A. M. O. LIRIO

Noted by:

(illegible)	- (illegible)
J. R. S. LACSAMANA	A. M. V. JALANDONI

LETTER DATED DECEMBER 13, 1983 FROM GABRIEL C. SINGSON TO CITIBANK, N.A.

CONFIDENTIAL

CENTRAL BANK OF THE PHILIPPINES
MANILA

Office of the Senior Deputy Governor

December 13, 1983

Citibank, N.A.
8741 Paseo de (illegible)
Makati, Metro Manila

Gentlemen:

It has been brought to our attention that your bank as of November 24, 1983 had remitted payments to foreign banks aggregating $176.247 million, which were included in the Central Bank's inventory of foreign exchange liabilities of October 14, 1983.

Please be advised that your explanation that the decrease, thru payments, of some of your foreign creditors balances, as of October 1(illegible), 1983 has been compensated by increase in other foreign creditor banks balances, thereby maintaining, if not exceeding the levels of October 14, 1983, is not compatible with the letter and spirit of the standstill agreement.

Very truly yours,

/s/ Gabriel C. Singson
GABRIEL C. SINGSON
Senior Deputy Governor

INSTRUCTIONS FOR PREPARING THE COUNTRY EXPOSURE REPORT

Form:	CC 7610-08	FFIEC 009 OMB 1557-0100 Expires 11/30/85
	FR 2036	OMB 7100-0035 Expires 11/30/85
	FDIC 6502/03	OMB 3064-0017 Expires 11/30/85

INSTRUCTIONS FOR PREPARING COUNTRY EXPOSURE REPORT

(Rev. 12/82)

INSTRUCTIONS FOR PREPARING COUNTRY EXPOSURE REPORT

PART I—INTRODUCTION

This report provides information on the distribution by country of foreign claims held by United States banks and bank holding companies. The individual returns are regarded as confidential and will not be voluntarily disclosed outside the federal bank regulatory agencies. Aggregated data that will not reveal the activities of individual banks will be published by these agencies. Portions of the aggregated data will also be reported to the Bank for International Settlements as part of an international cooperative effort to compile and publish worldwide data on cross-border claims.

The following indicates in general the nature of the information called for in the report. More precise descriptions, definitions, and instructions appear in Parts II, III, and IV of these instructions. The definitions of items are, for the most part, consistent with definitions used in the *Instructions for Preparation of the Reports of Condition and Income by all Insured Commercial Banks that have Foreign Offices and/or Edge Act or Agreement Subsidiaries.* Any differences from the definitions used in these Reports are noted in the appropriate paragraphs of these instructions.

The report has four sections: the first (columns 1-13), calls for information on the respondent's cross-border and non-local currency claims on foreigners; the second (columns 14-17), information on letters of credit and other commitments to extend credit to foreigners; the third, information on "local" currency activities with local residents of the respondents' offices in foreign countries; and the fourth, the net position of a respondent's offices in each country vis-a-vis its offices in other countries. In all of these actions the information is required on an individual country basis.

In the first section, column 4 of the report calls for total direct "cross-border claims" and "foreign-office non-local currency claims on local residents" based on the *country of residence* of the borrower. This total for each country is broken down in two ways: first, by the type of borrower (banks, public entities, and all other) in columns 1-3; second, by maturity in columns 5-8. Columns 9-12 indicate the extent to which the ultimate source of repayment may be in a country other than the country of domicile of the direct borrower. Thus, column 9 identifies those claims on banks reported in a particular country in column 1 that are guaranteed by banks (claims on bank branches and agencies are assured to carry the "guarantee" of the head office) and others in other countries. For each country line, the entry in column 9 is a component of column 1 (and of the total column 4). Column 10 then reallocates all the entries of column 9 to record those amounts on the country lines of the guarantors. The grand total of column 9 is equal to the grand total of column 10 (including appropriate entries on the U.S. line).

Columns 11 and 12 serve the same function for direct claims on nonbank borrowers (columns 2 and 3) as that just described for columns 9 and 10 with respect to claims on banks.

Column 13 identifies for BIS purposes that portion of claims in column 4 that represents "foreign-office non-local currency claims on local residents".

The second section of the report (columns 14-17) calls for the same type of information with respect to letters of credit and commitments that columns 1-3 and 9-12 do for direct credits outstanding. Columns 14 and 15 indicate the type of commitments while column 16 indicates what parts of the amounts recorded in columns 14 and 15 are guaranteed by residents of some other country. Column 17 reallocates these amounts to the lines for the countries of ultimate risk.

The third section of the report (columns 18 and 19) shows claims and liabilities of the foreign offices of the respondent that are with local residents and denominated in the local currency.

PART II—GENERAL INSTRUCTIONS

A. *Who must report*

The report is mandatory for commercial banks and/or bank holding companies as follows:

1. Every insured commercial bank in the 50 States of the United States, the District of Columbia, Puerto Rico, and U.S. territories and possessions, the meets *both* of the following criteria:

   (a) has at least one of the following:

   (1) a branch in a foreign country;

   (2) a subsidiary in a foreign country;

   (3) An Edge Act or Agreement subsidiary;

   (4) a branch in Puerto Rico or in any U.S. territory or possession (except that a bank with its head office in Puerto Rico or any U.S. territory or possession need not report if it meets only this criterion);

   (5) an International Banking Facility (IBF);

   AND

   (b) has, on a fully consolidated bank basis, total outstanding claims on residents of foreign countries exceeding $30 million.

2. Every bank holding company that is required to file the F.R. Y-6 report (Bank Holding Company Annual Report) and which owns only one bank satisfying the reporting criteria:

   (a) must file the report on a fully consolidated holding company basis *if* the subsidiary bank accounts for less than 90 per cent of the consolidated holding company's total claims on foreigners; in this case, no report need be filed for the individual bank;

   (b) may file the report, at its option, for either the individual bank on a fully consolidated bank basis, or for the holding company on a fully consolidated bank holding company basis, *if* the subsidiary bank accounts for 90 per cent or more of the consolidated holding company's claims on foreigners.

3. Every bank holding company that is required to file the F.R. Y-6 (Bank Holding Company Annual Report) and that owns two or more banks satisfying the reporting criteria:

   (a) must file a separate report on a consolidated bank basis for each bank that meets the reporting criteria;

   AND

   (b) if the subsidiary banks account for less than 90 percent of the consolidated company's total claims on foreigners, must file a report for the bank holding company on a consolidated holding company basis.

4. The bank regulatory authorities may specifically require other banks to file the report, if the bank is identified as having exposure deemed large relative to its capital funds.

B. *Reporting basis*

For institutions meeting the criteria for reporting described above, the information reported should include all United States offices, IBF's, foreign branches,

branches in Puerto Rico, and U.S. territories and possessions, and significant majority-owned bank and nonbank domestic and foreign subsidiaries, including Edge and Agreement subsidiaries. The information should be reported on a fully consolidated basis (except for column 20 which specifically requests information on net positions of offices within the reporting bank or holding company). For reports from banks, the information should be consolidated in accordance with the procedures and tests of significance set forth in the instructions for preparation of *Consolidated Reports of Condition (including Domestic and Foreign Subsidiaries)*. For reports from bank holding companies, the information should be consolidated in accordance with the principles set forth in the "Instructions to the Bank Holding Company Financial Supplement to Report F.R. Y-6." (For holding companies that file with SEC, these principles are the same as those contained in SEC Regulation S-X.)

C. *Filing of Reports*

The report is to be prepared semi-annually, as of the end of June and December. *Two* copies of the completed report should be submitted within 60 days of the reporting date. *At least one full-size original copy of the report must be filed.* The second copy may be a reduced-size photocopy. Reporting national banks should submit their reports to the Comptroller of the Currency, International Banking Activity Division, Washington, D.C. 20219. Reporting State member banks should submit their reports to the Federal Reserve Bank of the district where the reporting institution is located. Reporting nonmember insured banks should submit their reports to the Federal Deposit Insurance Corporation, Division of Bank Supervision, Washington, D.C. 20429.

Respondent bank holding companies should submit copies to both the District Federal Reserve Bank and to the supervisory agency for the bank that meets the reporting criteria.

D. *Alternative reporting*

In lieu of using the printed Country Exposure Report forms, the respondent may report the required data on computer print-outs which are in the identical format as the printed form, including names and codes of countries in the order in which they appear on the printed form. The computer print-out must be signed by a responsible officer of the reporting institution using the same statement that appears on the printed form.

E. *Founding*

Amounts reported on this form should be rounded to the nearest million dollars; however reporters who so desire may report in amounts less than $1 million provided such amounts are indicated by decimals.

PART III—DEFINITIONS OF CONCEPTS USED IN THE REPORT

A. *Claims*

The term "claims" used in this report refers to the following types of assets, as defined in the Instructions to the Report of Condition for Insured Comercial Banks:

- Demand and interest-bearing balances with:

  —banks in foreign countries.
  —foreign branches of other U.S. banks.
  —foreign branches of foreign banks.
  —U.S. branches and agencies of foreign banks.

- Balances with foreign central banks and foreign official institutions.
- Foreign securities held for the respondent's own account.
- Federal Funds Sold to foreigners, United States branches and agencies of foreign banks, or other

United States entities that are branches of a foreign company or where repayment is guaranteed by a foreign entity.

- Loans as defined in the instructions to the Report of Condition.
- Foreign direct lease financing.
- Investments in unconsolidated foreign subsidiaries and associated companies.
- Customers' liability on acceptances outstanding (excludes own acceptances purchased which already are shown as loans and prepaid acceptances (anticipations)).

Where the reporting bank is an *accepting* bank and has contracted with other banks to share in the acceptance transaction on a contingency basis, the total amount of the acceptance is to be reported by the accepting bank only. The other participating banks do not report any acceptance asset.

Columns 1-13 of the report ask for information on those portions of claims as defined above within the scope of definitions B and C below, with columns 9-12 being further defined by definition E. Similarly, columns 14-17 are further defined by definitions B, C, and F. Column 18 asks for information on those claims within the scope of definition D.

B. *Cross-border claims*

For purposes of this report, the cross-border claims of each reporting institution cover:

1. All claims, as defined in definition A above, of its U.S. offices (including IBF's, Edge and Agreement corporations, and offices in Puerto Rico and U.S. territories and possessions) with residents of foreign countries regardless of the currency in which the claim is denominated, and,

2. All claims of each of its offices in a foreign country with residents of other foreign countries regardless of the currency in which denominated.

Since the reports are on a fully consolidated bank (or fully consolidated holding company) basis, cross-border claims exclude any claims against those foreign branches or foreign subsidiaries that are part of the consolidated bank (or consolidated holding company). However, claims on unconsolidated subsidiaries of the reporting institution would be reported in the normal manner. Thus, if a report is filed on a consolidated bank basis, claims on foreign subsidiaries of its parent holding company would be reported, since such companies would not be included in the consolidation.

C. *Foreign-office non-local currency claims on local residents*

For purposes of this report, "foreign-office non-local currency claims on local residents" are those claims of a foreign office of the reporting institution that are *both* (1) with residents of the same country in which that office is domiciled, *and* (2) are denominated in the currency of another country, including the U.S. dollar. Claims denominated in the currency of the foreign country where the office is located are excluded. For example, claims by a London branch of the reporting bank on U.K. residents are included in this category if the claims are denominated in dollars or in marks, but are not included if they are denominated in British pounds.

Since the report is on a consolidated basis, "foreign-office non-local currency claims on local residents" exclude claims by one office of the reporting institution in a given country against another office in the same country that is part of the consolidated institution.

D. *Foreign-office local currency activities with local residents*

For purposes of this report, "foreign-office local currency claims on local residents" cover claims of a foreign office of the reporting institution that are *both* (1) with residents of the same country in which that office is domiciled, *and* (2) are denominated in the currency of that same country. Since the report is consolidated, this excludes any claims on other offices of the consolidated reporting institution that are in the same country. Local currency claims of this category are to be reported *only* in column 18; liabilities of this type are reported in column 19.

E. *Guaranteed claims*

Columns 9-12 ask for information on "guaranteed" claims. (Columns 16 and 17 ask for similar information on letters of credit and commitments to extend credit where the resulting claims are "guaranteed"; letters of credit and commitments are defined in definition F below.) For the purposes of this report, "guaranteed" claims are those claims of the reporting institution for which a third party formally and legally obligates itself to repay the reporting institution's claims on the direct obligor if the letter fails to do so. Documents that do not establish firm legal obligations, such as comfort letters, letters of awareness, or letters of intent, are *not* considered guarantees for the purpose of this report. The term "guaranteed" covers collateralized claims if the collateral is (a) tangible and liquid, including readily-marketable shares of stocks or bonds; *AND* (b) is *both* held and realizable outside the country of residence of the borrower. In cases involving collateral, the residence of the "guaranteeing" party, for purposes of the report, is the country in which the collateral is held unless the collateral is stocks or bonds, in which case it is the country of residence of the party issuing the security. For purposes of this report, claims on a branch or agency of an organization are considered as being guaranteed by the head office of the organization.

F. *Letters of Credit and Commitments*

The term "commitments", used in connection with columns 14-17, refer to letters of credit and binding contractual obligations of the reporting institution and include *only* the following items: column 14 includes commercial letters of credit issued or confirmed, and standby letters of credit; column 15 includes fee-paid loan commitments (less any amounts actually outstanding on the loans), undisbursed portion of loans contracted where the funds are available at the borrower's request, and formal and legal guarantees issued. It *excludes* commitments that are subject to further bank approval before disbursement of funds and credit authorizations (internal guidance lines).

G. *Country lines* (including international and regional institutions)

The report requires the information called for to be reported by country or by international and regional institution. Column (a) of the report form names the countries and international institutions for which the information is required, arranged by geographical area, and column (b) lists codes for the countries and institutions for data processing purposes.

The reporting requirement, and the report form listing, includes international and regional organizations as well as individual countries. Claims on such organizations, even if located in the United States, should be reported opposite the line "International", "Western European Regional", "Eastern European", "Latin American Regional", "Asian Regional", "African Regional", or "Middle Eastern Regional", as appropriate. The regional entries cover organizations that are regional in scope

such as the European Coal and Steel Community (Western Europe), the Inter-American Development Bank (Latin America), or the Asian Development Bank (Asia). The "International" entry covers organizations of a global character, such as the International Monetary Fund and the World Bank. For purposes of this report, the Bank for International Settlements and the European Fund are to be treated as "Other Europe", and not as "International" or "Regional". All international and regional institutions are to be reported as public entities for purposes of completing columns 1-3.

In addition to lines for foreign contries and international organizations, the form includes a line for the United States. This line is used only for entries on columns 9-12 and columns 16-17 (all other columns on the United States line are crossed out on the form). Its use is explained below in the instructions to specific columns. For purposes of this line, "United States" is defined as the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, Midway Islands, the U.S. Virgin Islands and Wake Island.

PART IV—INSTRUCTIONS FOR SPECIFIC COLUMNS OF THE REPORT

Report in columns 1-4 on the country line of the country of residence of the borrower, or on the international and regional lines as appropriate, cross-border claims and foreign-office non-local currency claims on local residents (as defined in Part III, definitions A, B and C). Distribute these claims for each country among columns 1, 2 and 3, depending on whether the borrower is a "bank", "public" entity, or "other" type of borrower, as defined below, under the individual column headings.

Column 4 is the total of columns 1-3 and reflects the total of cross-border claims and foreign-office non-local currency claims on local residents. *DO NOT REPORT* in columns 1-4 (or in any other column except column 13) any foreign-office *local currency* claims on local residents, as defined in Part III, definition D.

Column 1—Banks

For purposes of this column, the term "bank" covers the following institutions in foreign countries: commercial banks, savings banks, discount houses, and other similar institutions accepting short-term deposits. It includes banking institutions owned by foreign governments unless such institutions function as central banks or banks of issue. (The latter are shown as "public" borrowers.) Also included are the foreign branches of other U.S. commercial banks. The definition of banks here is identical to that used for "banks in foreign countries" in the Report of Condition.

The claims on banks to be reported in this column include those loans to and deposit balances with foreign banks, as defined for Schedules A and C of the Report of Condition, that are cross-border claims or foreign-office non-local currency claims on local residents, as defined in Part III, definitions B and C. Claims on foreign banks in column 1 also include acceptances of foreign banks that are held by the reporting institutions even though, in the Report of Condition, such holdings of bank acceptances are included in commercial and industrial loans, not in loans to banks.

Column 2—Public Borrowers

For this column, the term "public" covers the following foreign institutions: central governments and departments of central governments of foreign countries and their possession; foreign central banks, stabilization funds, exchange authorities, and government-owned banks that perform the functions of a central bank or a bank of issue; corporations and other agencies of central governments, including development banks, development

institutions, and other agencies whose shares are majority-owned by the central government or its departments; state, provincial and local governments of foreign countries and their departments and agencies; and *non-bank* commercial enterprises that are majority-owned by central governments, excluding, however, banking institutions owned by governments that do not function as the central bank and/or bank of issue. The "public" column also includes any international or regional organization or subordinate or affiliated agency thereof, created by treaty or convention between sovereign states. (The entries in this column for the international and regional organizations are entered on the lines of the report as stated in Part III, definition G.)

Column 3—Other borrowers

All cross-border claims and foreign-office non-local currency claims on local residents not attributed to columns 1 and 2 are to be reported in column 3. It covers claims on persons, businesses, and institutions other than "banks" and "public borrowers" defined above for columns 1 and 2.

Column 4—Total specific claims

Column 4 is the sum of columns 1, 2 and 3 and reflects the total of all cross-border claims and foreign-office non-local currency claims on local residents. It is also equal to the sum of columns 5, 6, 7 and 8.

Columns 5-8—Breakdown by maturity

Report in columns 5-8 a breakdown by time remaining to maturity of total claims reported in column 4 for each country and international or regional institution line. The maturity distribution should reflect amortization or final maturity dates, as appropriate, and *not* interest adjustment dates or roll-over dates. Loans that are payable on demand should be reported in the column for

maturities of one year and under, column 5. Loans for which scheduled repayments wall in more than one maturity column should be distributed to the appropriate maturity columns so as to reflect scheduled amortization. Example:

The entries for a 7 year loan in the amount of $14 million that is repayable annually in equal installments, with the first installment due within one year of the date of the report, would be:

Column 5	Column 6	Column 7	Column 8
2	2	6	4

Column 9—Claims on banks guaranteed in other countries

Report in column 9 on each country line the amounts reported in column 1 for that line that represent (1) claims on a branch or agency of a bank whose "head office" is located in another country, or (2) claims on a locally-chartered bank where the claim is guaranteed (as defined in Part III, definition E) by a bank or other guarantor in another country (including the United States), or by an international institution. Claims on banks that are subsidiaries of banks in other countries are not to be reported in column 9 unless an explicit formal and legal guarantee is involved.

For each foreign country line, the entries in column 9 are components of the entries in column 1 on the corresponding line. Note that in addition to the foreign country lines, column 9 also calls for an entry to the United States line. The entry on this line in column 9 is not a component of any entry in columns 1 or 4. On the United States country line under column 9, report claims on U.S. branches and agencies of foreign banks and any claims on New York investment companies engaged in banking or U.S. commercial banks that are majority-owned by foreigners where the claim carries the formal guarantee of a foreign resident.

No entries are made in column 9 on the international institution lines as, by definition, there are no claims on "banks" reportable in column 1 on those lines, since international institutions and regional organizations are defined as "public".

Column 10—Claims on banks distributed by country or guarantor

Report in column 10 on each country line including the U.S. line (and each international and regional line if (2) below is applicable): (1) claims or banking offices and agencies in other countries (including the United States as represented by the U.S. line entry in column 9), the head office of which is in the country indicated by the line stub, and (2) claims on banks in other countries guaranteed (as defined in Part III, definition E) by banks and others in the country (including the United States) indicated by the line stub or by international or regional institutions. On the U.S. line in column 10 report (1) claims on foreign branches and agencies of other U.S. banks, and (2) claims on foreign-chartered banks guaranteed by U.S. banks or by other U.S. residents.

The amounts reported in column 10 are a reallocation of the amounts reported in column 9; the grand total of column 10 should be equal to the grand total of column 9.

Examples for Columns 9 and 10:

(1) The respondent has a $10 million claim on a bank in the United Kingdom guaranteed by a French bank. Entries would be:

	Column 1	Column 9	Column 10
United Kingdom	10	10	—
France	—	—	10

(2) The respondent has a $10 million claim on a bank in Hong Kong that is a wholly-owned subsidiary of a Japanese bank but there is no formal guarantee by the Japanese bank. Entries would be:

	Column 1	Column 9	Column 10
Hong Kong	10	—	—
Japan	—	—	—

(3) The respondent has a $10 million claim on the Nassau branch of a U.S. bank. Entries would be:

	Column 1	Column 9	Column 10
Bahamas	10	10	—
United States	xx	—	10

(4) The respondent has a $10 million claim on the U.S. agency of an Italian bank. Entries would be:

	Column 1	Column 9	Column 10
Italy	—	—	10
United States	xx	10	—

Columns 11 and 12—Claims on public and other borrowers guaranteed in other countries

Column 11 is used to identify those claims on "public" entities and "others" (columns 2 and 3) that are guaranteed (as defined in Part III, definition E) by bank and nonbank "residents" of other countries (including the United States) in the same manner as column 9 identifies guaranteed claims on banks (column 1). On the U.S. line in column 11, report claims on U.S. residents that are guaranteed by residents of other countries. The entry on the U.S. line of column 11 is not a component of columns 2 or 3 (or of column 4); however all other entries in column 11 are components of the entries on the corresponding lines of column 2 or column 3.

Column 12 reallocates the guaranteed claims on "public" and "other" borrowers entered in column 11 to the countries (including the United States and international or regional institutions) of the guarantors in the same

manner as column 10 reallocates the guaranteed claims on banks reported in column 9. The grand total of column 12 should equal the grand total of column 11. Portions of claims on foreign residents reported in columns 2 or 3 that are guaranteed by the Eximbank, Defense Department, or other U.S. government agencies also should be reported in column 11 for the country of residence of the borrower, and in column 12 of the U.S. line (report in a similar manner any claims guaranteed by other U.S. residents).

Examples for Columns 11 and 12:

(1) The respondent has a $10 million claim on a Brazilian company guaranteed by a privately-owned Italian company. Entries would be:

	Column 3	Column 11	Column 12
Brazil	10	10	—
Italy	—	—	10

(2) The respondent has a $10 million claim on the U.S. subsidiary of a Belgian private company that has guaranteed the claim. Entries would be:

	Column 3	Column 11	Column 12
United States	xx	10	—
Belgium	—	—	10

(3) The respondent has a $10 million claim on the Belgian subsidiary of a U.K. company with a "comfort" letter from the parent. Entries would be:

	Column 3	Column 11	Column 12
Belgium	10	—	—
United Kingdom	—	—	—

(4) The respondent has a $10 million claim on the Belgian branch of a U.K. company. Entries would be:

	Column 3	Column 11	Column 12
Belgium	10	10	—
United Kingdom	—	—	10

(5) The respondent has a $10 million claim on the New Zealand embassy located in the U.S. Entries would be:

	Column 2	Column 11	Column 12
United States	—	10	—
New Zealand	—	—	10

The amounts reported in column 10 are a reallocation of the amounts reported in column 9; the grand total of column 10 should be equal to the grand total of column 9.

Examples for Columns 9 and 10:

(1) The respondent has a $10 million claim on a bank in the United Kingdom guaranteed by a French bank. Entries would be:

	Column 1	Column 9	Column 10
United Kingdom	10	10	—
France	—	—	10

(2) The respondent has a $10 million claim on a bank in Hong Kong that is a wholly-owned subsidiary of a Japanese bank but there is no formal guarantee by the Japanese bank. Entries would be:

	Column 1	Column 9	Column 10
Hong Kong	10	—	—
Japan	—	—	—

(3) The respondent has a $10 million claim on the Nassau branch of a U.S. bank. Entries would be:

	Column 1	Column 9	Column 10
Bahamas	10	10	—
United States	xx	—	10

(4) The respondent has a $10 million claim on the U.S. agency of an Italian bank. Entries would be:

	Column 1	Column 9	Column 10
Italy	—	—	10
United States	xx	10	—

Columns 11 and 12—Claims on public and other borrowers guaranteed in other countries

Column 11 is used to identify those claims on "public" entities and "others" (columns 2 and 3) that are guaranteed (as defined in Part III, definition E) by bank and nonbank "residents" of other countries (including the United States) in the same manner as column 9 identifies guaranteed claims on banks (column 1). On the U.S. line in column 11, report claims on U.S. residents that are guaranteed by residents of other countries. The entry on the U.S. line of column 11 is not a component of columns 2 or 3 (or of column 4); however all other entries in column 11 are components of the entries on the corresponding lines of column 2 or column 3.

(5) The respondent has a $10 million claim on an Italian non-company guaranteed by the United States Export-Import Bank. Entries would be:

	Column 3	Column 11	Column
United States	—	—	
Italy	10	10	

Column 13—Memorandum: Foreign-office non-local currency claims on local residents (components of column 4)

Report in this column, by country, the outstanding claims of the respondent's foreign offices on the residents of countries in which the offices are located where the claims are denominated in other than the local currency (e.g., dollar loans by a Japanese branch to residents of Japan) defined in Part III, definition C.

Example for column 13:

(1) The Brazilian branch of the respondent has a dollar-denominated claim in the amount of $10 million on a bank in Brazil. Each would be:

	Columns 1	Column 13	Column
Brazil	10	10	

The amounts reported in this column for each country and international or regional institution line are components of the corresponding line entries in column 4 and are reflected, as appropriate, in columns 1-12.

(NOTE: Entries would be made in column 13 for a particular country line if the reporting bank has a branch or subsidiary in that country).

Columns 14-17—Letters of Credit and Commitments

These columns require reporting of the respondent's letters of credit and binding commitments (as defined on Part III, definition F) that may read in later acquisition of cross-border claims and foreign-office non-local currency claims on local residents, as defined in Part III, definitions A, B, and C. Do not report in these columns any letters of credit and commitment involving foreign-office local currency claims on local residents.

Column 14—Letters of credit

Report in this column, by country, the contractual commitments under commercial or standby letters of credit as defined above in Part III F.

Column 15—All other commitments.

Report in this column, by country, all other commitments such as legally binding lines of credit and formal guarantees as defined in Part I.

Column 16—Letters of Credit and Commitments guaranteed by residents in other countries

Report in column 16 those letters of credit and binding commitments to residents of each country reported in

columns 14 and 15 that relate to the future acquisition of claims that will be guaranteed (as defined in Part III, definition E) by residents of other countries, including the United States. The foreign country entries in column 16 are components of the same country entries in columns 14 and 15. However, column 16 of the U.S. line is not a component of columns 14 and 15, which have no entries for the U.S. line. The U.S. line should include any binding commitments to lend or otherwise provide funds to U.S. agencies or branches of foreign banks or to other U.S. entities where repayment of amounts to be extended under commitments are guaranteed by residents of other countries.

Column 17—Letters of Credit and Commitments, distributed by country of guarantor

Report in column 17 on each country line (including the U.S. line) and each international or regional institution line, the amount of letters of credit and binding commitments involving guarantees reported in column 16 that have guarantors in the countries listed. The amounts reported in column 17 are a reallocation of the amounts reported in column 16. The grand total of column 17 must equal the grand total of column 16.

Column 18—Foreign-office local currency claims on local residents

Report in this column, on each foreign country line, outstanding claims of the respondent's foreign office that are (1) on residents of the country in which the office is located, and (2) denominated in the currency of that country (e.g., Belgian franc loans to residents of Belgium by a Belgian branch of the respondent). (See part III, definition D.) These amounts are reported only in column 18 and are not reflected in *any* other columns of the report.

(NOTE: Entries would be made in column 18 for a particular country line *only* if the reporting bank has a branch or subsidiary in that country).

Examples for Column 18:

(1) The Brazilian branch of the respondent has a Cruzeiro-denominated loan equivalent to $10 million on a bank in Brazil. Entries would be:

	Column 1-13	Column 18	Column
Brazil	—	10	

In contrast:

(2) The Brazilian branch of the respondent has a dollar-denominated loan for $10 million on a bank in Brazil. Entries would be:

	Column 1	Column 13	Column 18
Brazil	10	10	—

(3) The London branch of the respondent has a cruzeiro-denominated claim equivalent to $10 million on a bank in Brazil. Entries would be:

	Column 1	Column 13	Column 18
Brazil	10	—	—

Column 19—Foreign-office local currency liabilities to local residents

Report in this column, on each foreign country line, any liabilities of the respondent's foreign offices owed to residents of the country in which the office is located and payable in the currency of that country (e.g., Deutschmark liabilities of the respondent's German branch to German residents.)

Column 20—Net due to or due from own foreign offices

Report in this column the *net* amounts the respondent's offices in the country identified on the line stubs

have "due to" or "due from" all offices of the respondent, (including U.S. offices), that are located outside of that country (e.g., the net amount a German branch has "due to" the head office, and any other consolidated non-German office of the parent). Only a single net figure should be reported for all the offices of the respondent in a given country. If the offices in a given country taken together have a net "due to" position with all offices in all other countries combined, a positive figure should be reported; a net "due from" position should be indicated by brackets.

The amounts reported in column 2 represent the internal position of offices within the consolidated bank or the consolidated holding company. They are, therefore, not reflected in any other columns of the report, all of which are on a fully-consolidated basis that eliminates these positions.

Board of Governors of the Federal Reserve System
Comptroller of the Currency
Federal Deposit Insurance Corporation

COUNTRY EXPOSURE INFORMATION REPORT
as of ______________________________

____
Participating Institution

____
City State

Name, title and phone number of bank officer to whom inquiries regarding this report may be directed:

____
Name

____
Title

____
Area Code/Phone Number

This report is required to be filed by national banks, state member banks and bank holding companies and insured state non-member commercial banks pursuant to authority contained in Pub. L. —181, 12 U.S.C. 3907 *et seq.*

A photocopy of this report will be released to the public upon request.

[illegible]ountry Exposure Information Report

A[illegible]ounts in millions of U.S. dollars

PART A—Information on exposure (as defined for Column 1) to any country that exceeds 1 percent of the reporting institution's total assets or 20 percent of its primary capital, whichever is less.

Country	Claims Outstanding After Mandated Adjustments for Transfer of Exposure	Amount of Net Local Currency Claims Included in Column (1)	Adjusted Cross-Border and Foreign Office Non-Local Currency Claims					
			Total of Columns (1) Minus (2)	Distribution of Amount in Column 3				
				By Type of Borrower			By Maturity	
				Banks	Public Sector Entities	Other	One Year and Under	Over One Year
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

PART B—Information on exposures (as defined in Part A, Column (1)) to any country not listed in Part A, where exposure exceeds 0.75 percent of the reporting institution's assets or 15 percent of its primary capital, whichever is less

Names of countries where exposures meet the reporting criteria stated for Part B

____

____

____

Total amount of exposure to all of the countries listed $ [ ]

Statement by management of the reporting institution concerning the information reported above. (OPTIONAL)

MANAGEMENT'S STATEMENT WILL NOT BE EDITED OR SCREENED BY THE SUPERVISORY AGENCIES. DISCLOSUR[illegible] THE STATEMENT SHALL NOT SIGNIFY THAT ANY FEDERAL SUPERVISORY AGENCY HAS VERIFIED OR CONFIRMED [illegible] ACCURACY OF THE INFORMATION CONTAINED THEREIN.

PETITIONER'S

BRIEF

No. 88-1260

FILED
FEB 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

11

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CITIBANK, N.A.,
Petitioner,
v.

WELLS FARGO ASIA LIMITED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER CITIBANK, N.A.

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January 18, 1990

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49 pp

QUESTIONS PRESENTED

1. Whether, contrary to the design of federal banking regulation, a U.S. bank may be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

2. Whether, contrary to federal banking law and policy, the use of standard instructions to route funds through the New York bank accounts of foreign depositors constitutes an agreement by U.S. banks to be liable for deposits in their foreign branches when the deposits are taken or frozen by foreign governments.

RULE 29.1 STATEMENT

Citibank is a wholly-owned subsidiary of Citicorp. The only subsidiaries or affiliates of Citibank whose stock may be publicly held are: Banco Honduras, S.A., Banco Internacional de Colombia, S.A., Central Holdings Corp., Citibank Espana, S.A., Citibank Italia, S.p.A., Citibank Portugal, S.A., CityTrust Banking Corp., Compagnie Generale de Banque Citibank, Famibank, S.A., Fuyo General Lease Co., Ltd., KKB Bank AG, Saudi American Bank, Taiwan First Investment & Trust Co., Ltd., and the United Bank of Trinidad and Tobago Limited.

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BRIEF FOR PETITIONER CITIBANK, N.A.

2

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 852 F.2d 657. The order of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 11a) is unreported. The second opinion of the district court on the merits (Pet. App. 12a-24a) is reported at 695 F. Supp. 1450. The order of the court of appeals directing a limited remand (Pet. App. 25a-27a) is noted at 847 F.2d 837 (1988) (table). The first opinion of the district court on the merits (Pet. App. 28a-38a) is reported at 660 F. Supp. 946. The opinion of the district court denying respondent's motion for summary judgment (Pet. App. 41a-55a) is reported at 612 F. Supp. 351.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1988 (Pet. App. 9a-10a), and the order denying rehearing was entered on September 27, 1988 (Pet. App. 11a). The petition for a writ of *certiorari* was timely filed on January 25, 1989 and was granted on December 4, 1989. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are reprinted at Pet. App. 56a-62a.

STATEMENT

The question in this case is whether the home office of a U.S. bank is liable for deposits made at its branch in a foreign country when the foreign government prevents the branch from repaying those deposits. This question has arisen in a variety of situations in recent years. It is presented here in the context of a Philippine financial crisis in which the Philippine government prevented Citibank/Manila (a Philippine financial institution that is a branch of petitioner Citibank, N.A.) from repaying two U.S. dollar deposits that respondent Wells Fargo Asia Limited ("WFAL/Singapore"), a Singapore bank,[1] made with Citibank/Manila. The U.S. Court of Appeals for the Second Circuit held Citibank, N.A. liable for the deposits owed by Citibank/Manila.

As attested by the *amicus curiae* briefs of the federal government and others, the resolution of this question is of great importance to the federal bank regulatory system, the banking industry, and international financial markets. The imposition of liability on Citibank, N.A.

[1] WFAL/Singapore is a wholly-owned subsidiary of Wells Fargo Bank, N.A.

in the circumstances presented here is inconsistent with the basis on which the federal government has regulated foreign branch deposits. The governing rule of federal law is that, absent an express agreement assuming liability, a U.S. bank is *not* liable for deposits placed with its foreign branch when the foreign government prevents the branch from repaying.

A. The Background of the Case.

Citibank/Manila is a foreign branch of a U.S. bank. As such, it helps fulfill a congressional plan, first laid out in the Federal Reserve Act of 1913, for expanding U.S. commerce and financial activities around the world through the creation and development of foreign branches of U.S. banks. At the same time, Citibank/Manila is also a Philippine financial institution licensed to engage in banking in the Philippines and fully subject to Philippine banking law and regulations.[2] Foreign branches, such as Citibank/Manila, lend money both inside and outside the foreign country where they are located; they also engage in such other activities as the foreign government allows. Foreign branches are fully subject to whatever fiscal, monetary, and political constraints the foreign government may impose. The funding for foreign branches such as Citibank/Manila comes from deposits made by nationals of the foreign country and from other depositors who conclude that it is to their advantage to deposit money there. There are currently some 900 foreign branches of U.S. banks operating in 73 countries. They owe their depositors the equivalent of some $240 billion.[3]

[2] *See* J.A. 220.

[3] *See* Brief for the United States as *Amicus Curiae* on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 3 n.6 [hereinafter cited as "U.S. Am. Br. for Cert."].

Foreign branches (like other financial institutions) often borrow money from other sophisticated financial institutions, such as from WFAL/Singapore in the present case. In these transactions, the parties do not use the detailed written agreements typically found in consumer or other international business transactions. Instead, they participate in the "interbank placement" market, a major source of credit in which $750 billion changes hands daily on a "bid and asked" basis much like a commodities or securities exchange.[4] Financial institutions seeking to borrow or lend money in this market search for the most attractive terms that they can find and conclude deposit agreements (either directly or through brokers) in telephone calls that are later confirmed by cursory telexes. In this type of oral market, no single participant can or does seek to insert detailed contract terms dealing with the many contingencies that may arise.

When foreign branches of U.S. banks take deposits of U.S. dollars, they typically participate in the international market for Eurodollars. "Eurodollars" are U.S. dollars repayable outside the United States and held on deposit in a financial institution abroad.[5] United States companies use Eurodollars in their foreign operations, and non-U.S. entities use Eurodollars for a variety of purposes, including as payment for goods and services

[4] *See* Brief of the New York Clearing House Association and the Institute of International Bankers as *Amici Curiae* on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 7 [hereinafter cited as Clearing House Am. Br.].

[5] *See* M. Stigum, *The Money Market* 129 (1983); P. Oppenheim, *International Banking* 143 (3d ed. 1978); S. Robinson, *Multinational Banking* 162 (1972); M. Friedman, *The Eurodollar Market: Some First Principles*, in *The Eurodollar* 272, 275 (H. Prochnow ed. 1970); Harfield, *International Money Management: The Eurodollar*, 89 Banking L.J. 579, 585 (1972).

whose prices are denominated in dollars.[6] The international Eurodollar market has grown significantly over the past forty years and has established the U.S. dollar as a universal currency.

The Eurodollar market must possess two features in order to function: (1) a "clearing system" by which the large numbers of debits and credits that flow through the market can be netted out at the end of the day; and (2) a "settlement" mechanism by which funds can be transferred to reflect the debits and credits determined by the clearing system. In the case of the Eurodollar market, these functions are performed by a group of over 100 banks, which maintain an electronic clearing mechanism in New York to clear the transactions each day,[7] and the New York Federal Reserve Bank, which serves as the ultimate depository for settling the enormous sums of money involved.

Financial institutions that participate in Eurodollar transactions maintain accounts (either directly or through other banks) with one or more of the clearing banks. Each day, these financial institutions inform the clearing banks of their dollar transactions throughout the world; the clearing banks net out these amounts and then, acting either directly or through other clearing banks, transfer the required funds among clearing bank accounts held with the New York Federal Reserve Bank.[8] This entire process is electronic. When foreign banking institutions exchange Eurodollars through this process, they are said to "route" the funds through their New York accounts. Specifications of the accounts to be used in this settlement process are called "routing instructions."

[6] *See* Stigum at 141-43.

[7] This clearing mechanism is known as the Clearing House Interbank Payments System, or "CHIPS." The New York Clearing House Association explains the CHIPS system in greater detail in its *amicus* brief in support of petitioner in this case.

[8] *See* Stigum at 581.

The U.S. government has facilitated the expansion of the international Eurodollar market as a part of U.S. policy. As the Solicitor General observed in recommending *certiorari* in the present case, U.S. banking authorities "have, in essence, created the Eurodollar market"[9] by drawing a clear regulatory distinction between foreign deposits and domestic deposits and by treating Eurodollar deposits as foreign—*i.e.*, as payable only outside the United States.[10] As a result, Eurodollars have not been subject to various federal regulations, have not received various protections afforded domestic deposits, and have carried interest rates independent of (and generally higher than) interest rates payable on dollar deposits in the United States.

B. The Facts of the Case.

WFAL/Singapore made two $1 million deposits with Citibank/Manila in June 1983. It did so through a Singapore money broker, who entered into oral agreements by telephone with representatives of Citibank/Manila specifying an interest rate of 10 percent and repayment in December 1983. WFAL/Singapore, its broker, and Citibank/Manila all subsequently confirmed the interest rate and repayment date in telex messages to one another. As is typical in deposit transactions of this sort, the telexes also specified that the electronic transfers of the deposits and repayments would be routed through U.S. dollar accounts held in New York.[11] The 10 percent interest rate paid on WFAL/Singapore's deposits with Citibank/Manila was substantially higher than the 8.85 percent interest rate payable on comparable deposits in New York. Pet. App. 43a.

[9] U.S. Am. Br. for Cert. at 15.

[10] *See* discussion below at pp. 38-39.

[11] In this case, WFAL/Singapore held a dollar account with Wells Fargo Bank, N.A., in New York and Citibank/Manila held a dollar account with Citibank, N.A., in New York. Citibank/Manila's telex confirmations said in relevant part: "At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York." The broker's confirmations said in relevant part: "Repay: Wells Fargo International, New York Account Wells Fargo Asia Ltd., Singapore Account #003-023645." WFAL/Singapore's confirmations did not address the mechanics of repayment. Pet. App. 3a.

Faced with a deepening financial and political crisis and dwindling reserves of U.S. dollars (and other foreign currencies), the Philippine government in late 1983 took stringent steps to halt its precipitous financial decline and stabilize the situation long enough to work out longer-term solutions.[12] These steps include a regulation (Circular No. 970) directing all banks in the Philippines to surrender their U.S. dollars to the Philippine central bank and an order (MAAB 47) preventing all Philippine banks from using dollars to repay obligations owed to non-Philippine entities.[13] MAAB 47 applied to the $600 million in Eurodollar deposits held by Citibank/Manila, including the two WFAL/Singapore deposits.

Citibank/Manila petitioned the Philippine government for a waiver of the restrictions imposed by MAAB 47. The government ultimately denied the waiver, except to permit Citibank/Manila to use its U.S. dollar funds held outside of the Philippines to repay the dollar deposits. This enabled Citibank/Manila to repay almost half of the money it owed to its various dollar depositors, including $934,000 of the principal owed to WFAL/Singapore. The remaining balances are still blocked. (For the

[12] *The World Bank Annual Report 1984* at 93.

[13] MAAB 47 provided, in relevant part:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank [of the Philippines] thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

Pet. App. 22a.

entire period that these deposits have been blocked, the Philippine government has permitted Citibank/Manila to make interest payments in dollars to each depositor—including WFAL/Singapore—and these interest payments have been made.)

When Citibank/Manila was unable to pay WFAL/Singapore the $1,066,000 principal balance remaining on deposit in the blocked account, WFAL/Singapore demanded repayment from Citibank in New York. Citibank responded that it was not liable for this amount and that the deposit was payable only at the Philippine branch. It explained that WFAL/Singapore, by choosing to place its deposit in a Philippine financial institution and taking the higher interest rate paid on the deposits, bore the risk that the Philippine government might restrict withdrawal of the Philippine deposits.

In 1984, WFAL/Singapore brought this action against Citibank in the United States District Court for the Southern District of New York to recover the remaining principal of its Philippine placements. WFAL/Singapore asserted federal question jurisdiction under 12 U.S.C. § 632 and diversity jurisdiction under 28 U.S.C. § 1332 (a). After a bench trial in December 1986, the district court granted judgment for WFAL/Singapore. The court assumed that Philippine law governed the case and ruled that, under that law, "Citibank's worldwide assets are available for satisfaction of plaintiff's claim." Pet. App. 35a.

Citibank appealed the district court's ruling, arguing that MAAB 47 precluded recovery by WFAL/Singapore and that, in any event, U.S. banking law and policy required that Citibank not be held liable for deposits in Manila when the Philippine government prevented the branch from using its assets to repay the deposits. The United States government filed an *amicus curiae* brief in support of Citibank's position, emphasizing its "strong

policy that, in the absence of an agreement to the contrary, a U.S. bank should not bear the risk that a foreign government will impose restrictions on the deposits of its foreign branches." [14] The government argued that if Philippine law required U.S. banks to bear such risks (as the district court had held), it should not be given effect in U.S. courts.[15]

The court of appeals initially remanded the case with directions that the district court clarify its ruling. In particular, it directed the district court to determine what law applied and whether the parties had agreed on the place where repayment of the deposits was to be made. Pet. App. 26a.

On remand, the district court made supplemental findings of fact and conclusions of law. Pet. App. 12a-24a. First, the court determined that New York law should be applied to the case. Second, it found that the telex routing instructions referred only "to the location where the wire transfers effectuating repayment at maturity were to occur" and did not constitute agreement on "the place or places where [WFAL/Singapore] was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers." *Id.* at 14a. The court went on to explain that the real dispute in the case was over "which assets Citibank is required to use in order to satisfy its obligation to [WFAL/Singapore]." *Id.* at 19a. Finding that "the contract was silent on this issue" (*id.*), the court concluded that Citibank's worldwide assets were available to satisfy the ultimate liability for the Philippine branch's obligations (*id.* at 24a). Because MAAB 47 did not justify Citibank's refusal to use assets other than those

[14] Brief for the United States as *Amicus Curiae, Wells Fargo Asia Ltd. v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988) (No. 87-7685) at 15 [hereinafter cited as "U.S. Am. Br., below"].

[15] *Id.* at 22.

belonging to its Manila branch to repay the Philippine deposits, the court held Citibank liable. *Id.* at 22a-23a.

The court of appeals affirmed the district court's judgment, but on fundamentally different grounds. Pet. App. 1a-8a. The court began by acknowledging that "a debt on a deposit normally authorizes a demand for the money only at the relevant branch," but that this general rule is "subject to variation by agreement of the parties." *Id.* at 6a. The court did not overturn the district court's express finding that the parties had *not* agreed where or out of what assets that debt could be collected. Instead, it construed the standard wire routing instructions, which referred to a transfer of funds between accounts in New York, to be an agreement by Citibank to guarantee repayment of the Philippine branch deposits. Based on that conclusion and the absence of any "separate agreement restricting where the deposits could be collected," the court of appeals held that WFAL/Singapore was "entitled to collect the deposits out of Citibank assets in New York." *Id.* at 8a.

Recognizing the far-reaching importance of the decision below, the Solicitor General joined Citibank in urging that *certiorari* be granted. This Court granted *certiorari* on December 4, 1989.[16]

SUMMARY OF ARGUMENT

Two theories have been asserted in this case to hold Citibank liable for the deposits respondent made with Citibank/Manila. First, respondent and the district court argued that there is a general rule under state or foreign law imposing liability on U.S. banks for foreign branch deposits when a foreign government prevents the branch from repaying. Second, the court of appeals ruled

[16] Citibank has also petitioned for review in *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir.), *petition for cert. pending* (U.S. filed Dec. 20, 1988) (No. 88-1031) [hereinafter cited as "*Trinh*"], raising in a different context the same issue as the present case.

that by including standard routing instructions in deposit confirmations specifying remittance of the foreign branch deposits through the United States, Citibank agreed to assume such liability. Both positions are squarely contrary to federal law.

As we show in Section I, federal law provides that, in the absence of an express agreement to the contrary, U.S. banks are not liable for foreign branch deposits when foreign governments restrict withdrawal of such deposits. This rule of federal law is specifically stated in a 1970 regulation promulgated by the Federal Reserve Board acting pursuant to a congressional delegation of authority. The regulation provides: "a customer who makes a deposit payable solely at a foreign branch assumes whatever risk may exist that the foreign government may impose restrictions on withdrawals." 12 C.F.R. 204.128(c).

This allocation of foreign sovereign risk arises out of a fundamental distinction between domestic and foreign deposits. Under the federal banking statutes and regulations, domestic deposits require reserves, are insured, and are governed by regulations designed for the U.S. economy and the protection of the banking system and depositors here. Foreign deposits have none of these characteristics, but rather are governed by the host country and offer the foreign depositor the investment opportunities and risks present under the foreign regulatory regime.

Under well-settled principles discussed in Section II, Citibank cannot be subjected to liability that is consistent with the federal rule allocating the risk of foreign sovereign restrictions on withdrawals. Viewed as a matter either of federal preemption or of federal common law, federal law and policy prevent state or foreign law from imposing that risk on U.S. banks. Holding U.S. banks liable for foreign branch deposits in the face of these restrictions would cause substantial harm to important

federal policies, including: ensuring that foreign branches of U.S. banks can compete in foreign markets; protecting the safety and soundness of the U.S. banking system; promoting the international Eurodollar market; and having the regulation and operation of financial markets —which depend on the distinction between domestic and foreign deposits—proceed under stable and predictable rules.

In Section III we show that state and foreign law rules of liability with respect to foreign branch deposits cannot be relied on to protect the important federal interests at stake here. Principles of state and foreign law are, to be sure, generally consistent with the federal law rule. But there can be no assurance that such laws always will be consistent with the federal rule or that state and lower federal courts will apply these laws with the necessary sensitivity to the federal interests involved. To the contrary, recent experience demonstrates that federal interests would be put at substantial risk unless U.S. bank liability for foreign branch deposits were governed by the federal rule.

Finally, in Section IV we show that standard routing instructions for Eurodollar deposits, such as those involved here, do not constitute an agreement to shift liability to the home office of a U.S. bank merely because they specify that remittance of foreign branch deposits will be routed through the United States. As the Solicitor General has explained, the court of appeals' conclusion that the parties intended such instructions to alter the general allocation of foreign sovereign risk is "fundamentally inconsistent with the federal regulatory framework," [17] the understanding of the Eurodollar market, and the district court's findings of fact. Unless reversed, the decision below will harm federal interests by changing the basis on which the international Eurodollar market has long been conducted and regulated.

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[17] U.S. Am. Br. for Cert. at 13.

ARGUMENT

CITIBANK IS NOT LIABLE FOR DEPOSITS MADE IN ITS PHILIPPINE BRANCH WHEN THE PHILIPPINE GOVERNMENT PREVENTS THE BRANCH FROM REPAYING THE DEPOSITS.

Foreign branches of U.S. banks are the creation of Congress. Congress has drawn a firm distinction between deposits made with foreign branches and deposits in the United States. Congress has authorized the Federal Reserve Board to issue regulations concerning foreign branches and to apply the congressional distinction between foreign deposits and U.S. deposits. The Board has exercised this authority to issue a regulation stating that foreign depositors assume the risk that a foreign government may restrict withdrawal of the foreign deposits, unless there is an express agreement to the contrary. Congress has ratified the Federal Reserve Board's action.

As a matter of either preemption or federal common law, the federal rule allocating sovereign risk to foreign depositors must displace state or foreign law rules that would make U.S. banks liable for foreign branch deposits when foreign governments prevent their repayment by foreign branches. The federal allocation of sovereign risk is essential to the various federal policies pursued by Congress and the Federal Reserve Board in their regulation of foreign branches. Although prevailing common law principles in New York and elsewhere are consistent with the federal rule, they cannot be relied upon to ensure the necessary protection of the federal interest.

Nor can the court of appeals' ruling in this case be squared with federal law by construing the reference to New York bank accounts in the standard Eurodollar routing instructions as constituting an express agreement changing the normal federal allocation of sovereign risk. As the district court found, such instructions were not intended by the parties to have this consequence. They

have never been treated by federal regulations as having such significance, and could not be reinterpreted at this late date without a fundamental change in the international Eurodollar market.

I. FEDERAL LAW REQUIRES THAT DEPOSITORS IN FOREIGN BRANCHES OF U.S. BANKS ASSUME THE RISK THAT THE FOREIGN SOVEREIGN MAY RESTRICT WITHDRAWAL.

Since 1918, Congress and the Federal Reserve Board have enacted a framework of federal laws and regulations dealing with the international operations of U.S. banks. These laws and regulations have been designed to accomplish two federal objectives. First, they have sought to encourage the establishment and competitiveness of foreign branches of U.S. banks. Second, they have sought to safeguard the domestic U.S. banking system from actions by foreign sovereigns. To these ends, Congress and the Board have consistently drawn a fundamental distinction between foreign and domestic deposits, which recognizes that foreign branches of U.S. banks are subject to foreign regulatory regimes, leaves the benefits and burdens of such foreign control on foreign depositors, and protects the U.S. banking system from foreign sovereign actions. This is reflected in the Federal Deposit Insurance system, which insures only domestic deposits, and is the basis for a 1970 regulation of the Federal Reserve Board, which stated that: "[a] customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located may impose restrictions on withdrawals." [18]

Congress first authorized federally chartered banks to establish foreign branches in the Federal Reserve Act of 1913.[19] The foreign branches were intended to promote

[18] 12 C.F.R. 204.128(c) (1989).

[19] Ch. 6, 38 Stat. 251 (codified at 12 U.S.C. § 601 *et seq.* (1988)).

"the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States." [20] The Act required that each U.S. bank "shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office," 12 U.S.C. § 604 (1988),[21] and imposed special regulatory requirements on foreign branches designed to ensure sound operations.[22] Congress delegated to the Federal Reserve Board authority to approve foreign branch applications "upon such conditions and under such regulations" as it deemed necessary [23] and required national banks to obtain approval from the Board before they could establish foreign branches.[24]

[20] 12 U.S.C. § 601 (1988). The legislative history of the 1913 Act explained that foreign branching was designed to permit "better extension of American banking facilities in foreign countries to the end that our trade abroad may be enlarged and that American business men in foreign countries may obtain the accommodations they require in the conduct of their operations." H.R. Rep. No. 69, 63d Cong., 1st Sess. 16 (1913). Similarly, foreign branching was desired "for the purpose of facilitating the fiscal operations of the United States Government." H.R. Rep. No. 69, 63d Cong., 1st Sess. 17 (1913).

[21] The Act's legislative history emphasized that each foreign branch should be treated as an "independent institution" responsible for "conducting [its] affairs separate from those of the home office." H.R. Rep. No. 69, 63d Cong., 1st Sess. 30, 74 (1913).

[22] These requirements include provisions dealing with minimum capital and surplus, 12 U.S.C. § 601, reporting and information, *id.* at §§ 602, 604, and limits on authorized activities, *id.* at § 604a. *See also* 12 U.S.C. § 248i (1988); 12 C.F.R. 211.3(a) (1989).

[23] 12 U.S.C. § 601.

[24] In addition, state banks that are members of the Federal Reserve System are required to obtain the Board's approval before establishing a foreign branch. *See* 12 U.S.C. § 321 (1988). State banks that do not belong to the Federal Reserve System are required to obtain the approval of the Federal Deposit Insurance Corporation for a foreign branch. 12 U.S.C. § 1828(d)(2) (1988).

In exercising its delegated authority, the Federal Reserve Board has from the outset sought to promote competitive foreign branch operations and protect the U.S. banking system from foreign sovereign acts. This is illustrated by the Board's treatment, shortly after passage of the Federal Reserve Act, of the question whether U.S. banks are required to hold reserves in the United States with respect to foreign branch deposits.[25] In its 1918 legal opinion on this question, the Board observed that Congress had given it broad discretion to interpret and apply the Federal Reserve Act "to accomplish the purpose for which [foreign branches] are created, viz, to further the foreign commerce of the United States." 4 Fed. Reserve Bull. 1123 (1918). At the same time, the Board also emphasized its responsibility to safeguard the "interests of the parent bank . . . and the creditors in this country," including protecting them from the consequences flowing from the exposure of foreign branches to "the laws of various sovereignties." [26]

The Board ruled that U.S. banks would not be required to hold reserves for deposits in foreign branches. Looking to the purposes of domestic reserves, it emphasized that U.S. reserves were "clearly intended to protect pri-

[25] Reserve requirements, which originated with the Federal Reserve Act of 1913, direct banks to set aside a certain percentage of the deposits they take and prohibit the use of such funds for loans or other investments. Initially, reserves were required to ensure the safety and soundness of the U.S. banking system. Over time, however, they took on the primary function of enabling the Federal Reserve Board to contract or expand the money supply (by making reserve requirements more or less stringent). *See* Stigum at 17.

[26] 4 Fed. Reserve Bull. at 1123 (1918). The Board had seen no similar need to protect the U.S. banking system from non-sovereign risks when, in 1917, it had ruled that U.S. banks would be liable for the commercial failure of their foreign branches. *See* 3 Fed. Reserve Bull. 198-99 (1917) Citibank has consistently maintained that it will bear responsibility for the deposit obligations of its foreign branches in the absence of foreign sovereign interference.

marily the domestic creditors [depositors] of member banks," not creditors of foreign branches, and were unsuitable to support the needs of foreign branches and their depositors. 4 Fed. Reserve Bull. at 1123. The Board reasoned that foreign depositors would not be entitled to the protections afforded by the domestic U.S. banking system, but instead would assume whatever benefits and risks that the foreign regulatory regimes provided. This ruling also left the foreign branches of U.S. banks able to compete abroad with foreign financial institutions on more nearly equal terms by freeing them from the costs of maintaining reserves in the United States in addition to whatever reserves were required in the foreign country.[27]

Some two decades later, Congress returned to the question of foreign branches, providing by statute that deposits "payable only at an office [of a U.S. bank] in a foreign country" were not part of the domestic FDIC insurance system.[28] The statute "was not intended to apply the insurance feature to deposit accounts in [U.S. banks'] foreign branches." [29] In so legislating, Congress

[27] The Board's exemption of foreign deposits from reserve requirements was made at the same time that the Board concluded that domestic reserves also would not be necessary for separate foreign banking corporations owned by U.S. companies because foreign sovereigns themselves imposed reserve requirements with respect to foreign banking operations. *See* 5 Annual Report of the Federal Reserve Board at 798 (1918) ("From the published statements of foreign banks doing business in South American countries we notice that they seem to carry much larger cash reserves than are legally required of banks under our Federal Reserve system and probably American banks organized to do business there would have to do likewise. We therefore think that no regulations need be made as to reserves against deposits received in foreign countries").

[28] Banking Act of 1933, ch. 89, § 8, 48 Stat. 162, 176. *See* 12 U.S.C. § 1813(*l*)(5)(A) (1988).

[29] 77 Cong. Rec. 5891 (1933) (statement of Sen. Bulkley).

determined that the foreign depositor—not the U.S. bank—assumed the risk of the foreign regulatory environment. By excluding foreign deposits from FDIC coverage, the FDIC deposit insurance fund that supports the domestic U.S. banking system was protected against foreign sovereign acts, and foreign branches of U.S. banks were relieved of the competitive burden of having to pay U.S. insurance assessments.

At the same time that it addressed the scope of the FDIC system, Congress also provided by statute that foreign branch deposits would not be subject to federal interest rate restrictions. The domestic interest rate restrictions were imposed as part of the effort to protect the U.S. banking system from the excesses that had led to many U.S. bank failures in the late 1920s and early 1930s.[30] Congress determined that these restrictions should not apply to deposits "payable only at an office of [a U.S. bank] located in a foreign country."[31] This had the effect of allowing foreign branches of U.S. banks to compete in attracting deposits abroad by offering the same interest rates that were generally available in the foreign country.

In 1970, the Federal Reserve Board revisited the question whether reserve requirements and interest rate limitations would apply to foreign branch deposits and promulgated a regulation covering the matter. The Board's 1970 regulation was in part a response to the circumvention of the domestic regulation by some U.S. banks, which were taking deposits at their foreign branches and guaranteeing repayment at the home office in the United States. The banks paid the higher interest rates permissible for foreign deposits and did not set aside reserves applicable to domestic deposits.

[30] S. Rep. No. 77, 73d Cong., 1st Sess. 9-15 (1933).

[31] Banking Act of 1933, ch. 89, § 11(b), 48 Stat. 181. *See* 12 C.F.R. § 217.1(c)(2).

In ruling on such arrangements, the Federal Reserve Board explained that foreign branch deposits had been exempted from interest rate limitations and reserve requirements "to enable foreign branches of U.S. [banks] to compete on a more nearly equal basis with banks in foreign countries in accordance with the laws and regulations of those countries." 12 C.F.R. § 204.128(c). It recognized that the foreign governments might impose restrictions on the deposits and explicitly stated that:

> A customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals. *Id.*

The Board went on to state that parties could by agreement vary the "normal" allocation of the risk of sovereign restrictions on withdrawal of foreign branch deposits: "When payment of a deposit in a foreign branch is guaranteed by a promise of payment at an office in the United States if not paid at the foreign office," then the foreign "depositor no longer assumes" the risk of sovereign interference "but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the depository institution." *Id.* In cases involving such an agreement, the Board ruled that foreign deposits become payable in the United States and therefore are subject to domestic reserve and interest rate regulations. Significantly, however, where there is *no* such agreement regarding the obligations of the U.S. bank to repay despite a foreign sovereign's withdrawal restrictions, a deposit in a foreign branch is "payable only abroad."[32]

[32] This analysis was set forth in a Staff Opinion of the Federal Reserve Board:

> The trust department of a bank places trust cash in a non-interest-bearing time deposit at the bank's Nassau branch. Funds placed in the Nassau branch are not subject to reserve requirements and create a greater credit for the trust depart-

Congress has ratified the Board's pronouncement that, in the absence of an express agreement to vary the normal rules, foreign depositors assume the risk of foreign sovereign restrictions on withdrawal. In 1980, when Congress amended the Federal Reserve Act in several respects, it made explicit the rule that reserves need not be taken for deposits "payable only outside the . . . United States." 12 U.S.C. § 461(b)(6) (1988). In so providing, Congress stated that the "express . . . intent of the legislation [is] not to disturb the classifications as between domestic and foreign deposits which have been developed under existing law." [33]

The foregoing discussion demonstrates that Congress and federal regulators have long sought to promote the establishment and competitiveness of foreign branches of U.S. banks while protecting the U.S. banking system from the exposure of overseas branches to foreign sovereign acts. They have pursued these policies by drawing a fundamental distinction between foreign and domestic

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ment than funds deposited with the bank's U.S. offices, which are subject to reserves. *There is no written agreement between the Nassau branch and the trust department for this arrangement*, and the funds deposited have a one-day maturity.

The practice described does not violate Regulation D, which generally does not limit the ability of a foreign branch of a depository institution to accept deposits of $100,000 or more from U.S. residents, including cash balances of the bank's own trust department accounts. *However, if the deposits at foreign branches are not payable only outside the United States, then such deposits would be subject to Regulation D reserve requirements.*

3 Fed. Banking L. Rep. (CCH) ¶ 30,499O, at 14,358 (Staff Opinion, Feb. 23, 1982) (emphasis added). *Accord id.* (Staff Opinion, July 29, 1983).

[33] H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979). *Accord*, 125 Cong. Rec. 19,671 (1979) (statement of Rep. Garcia) (intention is to codify existing administrative treatment of foreign deposits and "to preserve and retain the distinction under current law between domestic and foreign deposits for reserve purposes").

deposits and by determining that important features of the domestic banking system, such as reserve requirements, deposit insurance, and interest rate limits, would not apply to foreign deposits. Depositors in foreign branches of U.S. banks, like depositors in other banks in that foreign country, have the benefits and burdens imposed by the regulations of the foreign governmental authority. In sum, Congress and the Board have expressly determined that foreign depositors—not U.S. banks—assume the risk that foreign sovereigns may restrict withdrawal of deposits payable only abroad, unless the parties expressly agree to the contrary.

II. THE FEDERAL ALLOCATION OF SOVEREIGN RISK DETERMINES THE LIABILITY OF U.S. BANKS FOR FOREIGN BRANCH DEPOSITS BECAUSE OF THE SUBSTANTIAL CONSEQUENCES SUCH LIABILITY HAS FOR FEDERAL INTERESTS.

We have shown above that the federal rule allocating foreign sovereign risk is an integral part of the system established by Congress and the Federal Reserve Board to promote foreign branches of U.S. banks while protecting the U.S. banking system from foreign sovereign interference. Respondent and the district court nonetheless contend that this case is governed by state or foreign law providing a different rule—a rule that allocates sovereign risk to the U.S. bank rather than to the depositor. In other words, a depositor in the foreign branch of a U.S. bank could "look[] to the bank, and all of its resources, for repayment at maturity." Br. in Opp. at 6. *See* Pet. App. 18a-24a, 35a.

This position is plainly wrong. If state or foreign law were construed to require the home office of a U.S. bank to repay deposits in its foreign branch that the foreign government prevents the branch from repaying, it would run afoul of federal banking statutes and policies and therefore would be displaced either as a matter

of federal preemption or by application of uniform federal common law. Under either theory, the allocation of sovereign risk set forth by Congress and the Federal Reserve Board and incorporated into the fabric of the Nation's banking system must prevail.

Before turning to the presumption and federal common law arguments, we note that the choice between these two modes of analysis is not critical to the ultimate disposition of this case. Both lines of inquiry are directed to the same essential question: whether paramount federal law and policies displace otherwise applicable state or foreign law. At bottom, the preemption and federal common law approaches have much in common. Indeed, this Court has recognized that federal common law "is necessarily informed . . . by articulated congressional policies"[34] and that federal statutes and regulations "provide useful guidelines in fashioning such rules of decision."[35] As academic commentators have pointed out, there is no sharp distinction between a court's interpreting a statute or regulation as part of a preemption analysis or formulating federal common law in light of the surrounding federal law and policies.[36]

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[34] *First Nat'l City Bank v. Banco Para el Commercio Exterior de Cuba*, 462 U.S. 611, 623 (1983).

[35] *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 n.5 (1972).

[36] *See, e.g.*, P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 863, 895-96 (3d ed. 1988); Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 893-96 (1986); Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 4-5 (1985); Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 Mich. L. Rev. 311, 331-36 (1980); Monaghan, *Constitutional Common Law*, 89 Harv. L. Rev. 1, 12-13 n.69 (1975).

A. Federal Law Preempts State or Foreign Law Allocating Foreign Sovereign Risk.

It is well established that "state regulation in a particular field . . . is pre-empted when it actually conflicts with federal law."[37] In particular, such a conflict will be found where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[38] Moreover, preemption is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[39] Under this standard, preemption is particularly appropriate in areas not "traditionally occupied" by the states, or in which there is a compelling national interest.[40]

As explained in Section I, Congress and its delegate, the Federal Reserve Board, have expressly prescribed an allocation of the risk that foreign sovereigns may restrict withdrawal of deposits in foreign branches of U.S. banks. The clearest expression of that determination is found in the Board's regulation:

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[37] *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1150 (1988).

[38] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[39] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

[40] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court recently observed that "[e]ven before our landmark decision in *Clearfield Trust* . . . the distinctive federal interest in a particular field was used as a significant factor giving broad preemptive effect to federal legislation in that field." *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2516 n.4 (1988). Of particular relevance here, Congress's power to regulate foreign commerce has been held to be more extensive than the authority of Congress over domestic commerce, thereby leading more readily to either dormant or affirmative preemption of state regulation. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) ("there is evidence that the founders intended the scope of the foreign commerce power to be the greater"); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 195 (1983); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432 (1941).

A customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals.[41]

This regulation reflects a rule of positive federal law governing the allocation of foreign sovereign risk. In promulgating the regulation, the Federal Reserve Board made no reference to state or foreign law: instead, it announced a single, uniform federal standard to promote the federal policies of encouraging foreign branches while ensuring that "the interests of the parent bank . . . be safeguarded and the creditors in this country . . . be protected." 4 Fed. Reserve Bull. 1123 (1918). Likewise, when Congress in 1980 codified the Board's distinction between foreign and domestic deposits, it too adopted a federal allocation of sovereign risk without reference to state or foreign law. 12 U.S.C. § 461(b)(6).

Any rule of state or foreign law that purports to hold Citibank liable contrary to this federal allocation of risk is preempted because it "conflicts with federal law,"[42] and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[43] Particularly because this issue arises in the fields of foreign commerce and foreign relations where it is essential that the Nation "speak with one voice," a state or foreign rule that places foreign sovereign risk on Citibank must yield to the supremacy of federal law and policy.[44] Placing sovereign risk on Citibank in the circumstances presented here would run roughshod over the differences between U.S. banks and their foreign

[41] 12 C.F.R. § 204.128(c).

[42] *Schneidewind*, 108 S. Ct. at 1150.

[43] *Hines*, 312 U.S. at 67.

[44] *Japan Line*, 441 U.S. at 448-49 (quoting, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

branches that have been so carefully established in federal law and regulation.

First, imposing liability on U.S. banks beyond that allowed by the federal allocation of sovereign risk would create significant disincentives to foreign branching and U.S. foreign commerce by exposing Citibank and other U.S. banks to home office liability for foreign deposits in cases of foreign sovereign interference. United States banks hold an enormous pool of deposits abroad. *See* discussion above at p. 3. When U.S. banks face home office liability for such deposits because of foreign governmental actions—which by definition are entirely beyond their control—their foreign branch operations become the source of new, substantial, and unanticipated liabilities that their foreign competitors do not face.[45] This disincentive to foreign branch operations would be particularly strong in regions of the world where economic, social, or political conditions are less stable.

Second, allocating foreign sovereign risk to U.S. banks would disrupt the federal regulatory system by causing uncertainty about the application of domestic bank regulatory requirements and the costs of foreign branch deposits. Virtually all such deposits would be transformed into deposits payable in the United States, thereby putting into question the exemptions heretofore given to such deposits from U.S. reserve obligations, FDIC assessments, and other requirements. For much the same reasons, allocating foreign sovereign risk to U.S. banks

[45] Thus, for example, courts in England and France have ruled that banks in those countries will not be held liable in circumstances parallel to those presented here. *E.g.*, *Joachimson v. Swiss Banking Corp.*, [1921] 3 K.B. 110, 127 (England); *Dame Ba Tu Thu Van v. Banque National de Paris*, Tribunal de grande instance de Paris, 9éme Chambre (Mar. 8, 1985), *reported in* Recueil Dalloz Sirey 500-01 (1985) and *Dame Thi To Tam et autres v. Banque Francaise Commerciale*, Tribunal de grande instance de Paris, 9éme Chambre (Mar. 12, 1985), *reported in* Recueil Dalloz Sirey 500-01 (1985) (France).

would also frustrate important federal policies relating to the international Eurodollar market, which provides an efficient global source of funds in a universally accepted currency for international businesses.[46] Congress and the Federal Reserve Board have encouraged the development of the Eurodollar market precisely by adopting the long-standing exemptions of deposits payable abroad from domestic banking regulatory requirements. Uncertainty with respect to the continued application of these exemptions would impair the functioning of this market and the continued ability of U.S. banks' foreign branches to seek funding from Eurodollar deposits.

Third, respondent's position would provide foreign sovereigns with economic and political leverage against the United States. Foreign governments regulate the day-to-day operations of their financial institutions, including the foreign branches of U.S. banks located within their territory.[47] Foreign sovereigns have plenary authority over such institutions, and foreign government regulation can include steps to implement fiscal, monetary, and other governmental policies whether by market mechanisms or by other measures such as exchange controls, debt moratoriums, currency revaluations, and expropriatory actions. Holding U.S. banks responsible to foreign depositors for any loss resulting from such foreign government regulation would expose U.S. banks (and the U.S. banking system) to substantial liability. Accordingly, many internal financial or monetary actions of foreign nations would be converted into matters of U.S. banking and foreign relations concern. Indeed, the vulnerability of the U.S. banking system would create a new set of limits on U.S. foreign policy options.

[46] *See* G. Bolton, *Background and Emergence of the Eurodollar Market*, in *The Eurodollar* 3, 15 (H. Prochnow ed. 1970); P. Oppenheim at 153-54; S. Robinson at 288.

[47] As described above, Citibank/Manila, for example, is a Philippine financial institution licensed by the responsible authorities of the Republic of the Philippines. *See* J.A. 220.

Finally, with respect to outstanding deposits, the U.S. bank regulatory system has provided domestic depositors with a high degree of security but at rates of return that have reflected the cost of that security. In contrast, depositors in foreign branches of U.S. banks—including WFAL/Singapore here—have taken what the foreign market offered, including opportunities for higher returns subject to the political and economic risks present abroad. In effect, the contrary allocation of sovereign risk gives depositors such as WFAL/Singapore an unauthorized form of deposit and the best of both worlds: protection in the American market for which no insurance or reserve provision has been made and the better rates available because of the risks prevailing abroad.

B. Principles of Federal Common Law Mandate the Displacement of State or Foreign Law Allocating Foreign Sovereign Risk.

Even if positive federal law did not directly preempt state or foreign law in this case, principles of federal common law would mandate a federal allocation of the risk of sovereign interference with foreign branch deposits. A uniform rule of federal law is necessary here in order to effectuate federal policies and to provide a national standard governing the liability of U.S. banks to depositors in their foreign branches.

The "need and authority" for federal courts to fashion principles of federal common law is well established.[48] "[I]t is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition."[49] Indeed, this Court "has recognized a responsibility, in the absence

[48] *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

[49] *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981).

of legislation, to fashion federal common law" where necessary to protect important federal interests.[50]

In determining whether a principle of federal common law is appropriate, this Court looks to whether the area involves a "uniquely federal interest" and whether "the 'application of state law would frustrate specific objectives' of federal legislation."[51] Where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,'" the federal policy must prevail.[52] And in assessing the compatibility of state or foreign law with federal interests, it is clear that "[t]he conflict with federal policy need not be as sharp [for federal common law purposes] as that which must exist for ordinary preemption."[53]

In addition, the Court has held that federal common law displaces state law rules "where a uniform national rule is necessary to further the interests of the Federal Government . . . ."[54] Where "there is an overriding federal interest in the need for a uniform rule of decision," this Court repeatedly has fashioned a single federal standard.[55]

This case satisfies the tests for the application of federal common law. First, it arises at the intersection of

[50] *Id.* Contrary to respondent's suggestion (Br. in Opp. 13-14 & n.14), federal common law plainly can apply in lawsuits between private parties and is not limited to cases in which the United States is a litigant. *See, e.g., Boyle*, 108 S. Ct. at 2515; *Illinois v. City of Milwaukee*, 406 U.S. at 105 n.6.

[51] *Boyle*, 108 S. Ct. at 2514, 2515 (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)). *See Miree v. DeKalb County*, 433 U.S. 25, 29 (1977).

[52] *Boyle*, 108 S. Ct. at 2515.

[53] *Id.*

[54] *Miree*, 433 U.S. at 29.

[55] *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. at 105 n.6; *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943).

two fields of uniquely federal concern—foreign commerce and foreign relations. The Constitution gives the federal government the primary role in addressing questions of foreign commerce. Article I, § 8, cl. 3 grants Congress extremely broad power to regulate commerce "with foreign Nations." *See* n. 40, *supra*. Similarly, the federal government enjoys unquestioned plenary authority over the Nation's foreign relations.[56] As the Court only recently remarked, there is a "distinctive federal interest in . . . 'the exterior relations of this whole nation with other nations and governments.'"[57] At the same time, the role of the states in the Nation's foreign affairs is unusually circumscribed. "[I]n respect of our foreign relations generally, state lines disappear. As to such purposes the State . . . does not exist."[58]

The allocation of foreign sovereign risk directly implicates the federal interests in both foreign commerce and foreign relations. Federal law and policy require that neither U.S. banks nor the U.S. banking system be held to answer when foreign sovereigns take actions preventing foreign branches from repaying deposits made abroad. This rule protects the U.S. banking system from hostile foreign sovereign acts; it serves to ensure that U.S. banks have adequate deposit insurance in light of their potential liabilities; it encourages the Nation's foreign commerce by promoting foreign branching by U.S. banks; and it facilitates the international Eurodollar market. An allocation rule having these important consequences for the federal government should not be the province of state or foreign law.

[56] *See, e.g., United States v. Belmont*, 301 U.S. 324, 331 (1937); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

[57] *Boyle*, 108 S. Ct. at 2516 n.4. *Accord, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697-98 (1976).

[58] *Belmont*, 301 U.S. at 331.

Furthermore, a federal common law rule governing the allocation of foreign sovereign risk is supported by the need for a standard that is uniform and workable. Important federal statutory provisions, such as those imposing reserve requirements and FDIC insurance coverage, depend directly on the distinction between deposits payable abroad and those payable in the United States. Federal regulators therefore must be able to determine whether a particular deposit is payable only abroad or whether, instead, a U.S. bank has assumed liability when the foreign government interferes. To allow state or foreign law to dictate whether and when the enormous pool of foreign deposits of U.S. banks are payable only abroad would entrust to state and foreign governments, rather than Congress and federal regulators, the ability to determine the amounts of reserves and the coverage of the FDIC system.

Allowing foreign or state law to allocate the risk of foreign sovereign interference to U.S. banks would also be unworkable for both banking institutions and federal regulators. In ascertaining whether domestic requirements must be applied to a particular deposit under such an approach, both the U.S. bank and its federal regulators would be required to resolve—for *each* foreign branch deposit—several complex questions, including in what jurisdiction litigation to obtain repayment of the deposit could be brought, what choice-of-law rules that jurisdiction applies, what substantive law those choice-of-law rules would select, and whether that substantive law would hold the home office liable in cases of foreign sovereign interference. These answers will often be unknown or even unknowable. Federal regulatory interests do not permit a system in which important regulatory obligations cannot reliably be ascertained, even after an exhaustive analysis of the laws of 50 states and countless foreign countries. The paramount federal interest therefore, requires that *federal* rules specify which deposits are payable only abroad and whether the foreign depositor bears the risk of foreign sovereign action with respect to deposits made in the foreign country.

Development of a federal common law principle is particularly appropriate here because Congress has explicitly provided for the possible development of such principles where disputes concern international banking transactions. The Federal Reserve Act provides not only that U.S. courts are to have jurisdiction to decide international banking disputes, but also that such disputes "shall be deemed to arise under the laws of the United States." 12 U.S.C. § 632 (1988). Unless Section 632's "arising under" clause is interpreted as granting the authority to fashion rules of federal common law where necessary, it would merely duplicate the section's grants of jurisdiction and removal authority. This would, of course, violate basic principles of statutory construction.[59]

Indeed, the case for a federal common law rule is far stronger here than in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), where the Court only recently applied federal common law principles. In *Boyle*, there was no extensive set of federal statutes and regulations with respect to the tort liability of government contractors; in this case, by contrast, numerous federal statutes and regulations exhibit the strong federal interest in the allocation of foreign sovereign risk. In *Boyle*, there was no body of federal regulation whose application turned upon the principle of liability at issue; in this case, by

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[59] *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). In similar circumstances, Justice Jackson concluded that a parallel provision of the FDIC Act provided a basis for federal common law principles. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 467-68 (1942) (Jackson, J., concurring) ("this provision [12 U.S.C. § 1819 fourth] is not merely jurisdictional" because of the "presence in the same section of the Act of the separate provision that the Corporation may sue and be sued").

contrast, federal regulators must depend on the principle of liability in enforcing banking statutes and regulations that protect the U.S. banking system. And in *Boyle*, in contrast to this case, the issues did not directly implicate the Nation's foreign commerce and foreign relations, and Congress had passed no statute equivalent to 12 U.S.C. § 632 deeming the subject at issue to "arise under the laws of the United States." If, as this Court determined, the situation in *Boyle* required application of a federal common law defense, this case plainly warrants application of federal common law as well.

Analogous to *Boyle*, federal common law in this case provides a defense to any claim of liability under state or foreign law that is based on the allocation of foreign sovereign risk to the home office of a U.S. bank.[60] In all other respects, where state or foreign law does not conflict with federal policies, local law will continue to govern the deposit relationship.[61] Although the role of federal common law is thus narrowly tailored, it is essential to the protection of the federal interests involved.

III. STATE OR FOREIGN LAW WITH RESPECT TO U.S. BANK LIABILITY FOR FOREIGN BRANCH DEPOSITS DOES NOT ADEQUATELY PROTECT FEDERAL INTERESTS.

The Solicitor General agrees that the "federal banking agencies have long premised their regulations on an understanding that a depositor who opens a foreign branch account assumes the risk that the foreign government may restrict his right to repayment." [62] He also agrees that "Citibank is correct that a contrary understanding

[60] *See also, e.g., Westfall v. Erwin*, 484 U.S. 292 (1988).

[61] *See Boyle*, 108 S. Ct. at 2516 (when "the conflict [between state and federal law] is more narrow, . . . only particular elements of state law are superseded").

[62] U.S. Am. Br. for Cert. at 18.

would create a serious tension" with federal law and policy.[63] Nonetheless, the Solicitor General suggests that "at this juncture" it may not be necessary to "articulate a federal rule governing these matters" [64] because general principles of banking law may ultimately be sufficient to protect federal interests. Although general principles of banking law in part gave rise to and are consistent with the federal allocation of sovereign risk to foreign depositors, these principles are not in themselves sufficient to ensure realization of congressional goals—particularly in light of the recent confusion in applying the principles.

We agree with the Solicitor General that it was recognized at common law that the home office of a bank would not be held liable to repay deposits placed in a foreign branch when a foreign sovereign prevented the branch from repaying. This principle was most clearly stated in two decisions applying New York law shortly after Congress excepted foreign branch deposits from federal interest rate limitations and deposit insurance premiums.[65] Thus, in *Dougherty v. National City Bank*, 157

[63] *Id.*

[64] *Id.*

[65] The New York courts had earlier addressed a somewhat different question in *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), *on remand*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd without opinion*, 223 A.D. 754, 227 N.Y.S. 907, *aff'd*, 250 N.Y. 69, 164 N.E. 745 (1928). In *Sokoloff*, the New York Court of Appeals held a U.S. bank liable to a depositor resident abroad despite a foreign sovereign's seizure of the bank's foreign branch. In that case, however, the deposit in question had been made at the bank's home office—not the foreign branch. Subsequent New York decisions have limited the result in *Sokoloff* to the particular situation where a deposit is placed with the home office itself. *See Dougherty v. Equitable Life Assurance Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1934). *See also Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (1935). The *Sokoloff* decision by its terms was also limited to cases involving foreign "sovereign" action by an entity that the U.S. government had refused to recognize as a lawful government. *See Sokoloff*, 164 N.E. at 749.

Misc. 849, 285 N.Y.S. 491 (1935), the New York Supreme Court held that the home office of a U.S. bank was not liable for deposits placed with its Russian branches where the Soviet government appropriated the assets and liabilities of the branches.[66] Likewise, in *Tillman v. National City Bank*, 118 F.2d 631, 633 (2d Cir.), *cert. denied*, 314 U.S. 650 (1941), the Second Circuit reached the same result, reasoning that "the deposits in defendant's branches were not converted into continuing deposits payable in New York" following Soviet closure of the branches.[67]

In 1965, shortly before the Federal Reserve Board promulgated its definitive regulation on treatment of foreign branch deposits, Justice Harlan set out the general banking law principles that govern home office liability for foreign branch deposits.[68] As Justice Harlan

[66] The court accepted the bank's argument that "the acts and decrees of the Soviet government in closing the branches, ejecting the [bank's] personnel from Russia, appropriating all of the assets of the defendant in Russia, declaring the branches liquidated, and decreeing the rights of the depositors to be state property, excused the defendant from making any payment to the depositors." *Id.* at 505.

[67] *See also Dougherty v. Equitable Life Assurance Soc'y*, 193 N.E. at 903 (U.S. life insurance company not liable to pay surrender value of life insurance contracts issued by its Russian branches where Soviet government cancelled contracts, because "the Soviet decrees became the law of Russia, governing the policies here in question, and . . . obligations thereunder were at an end."); *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984); *Trujillo-M v. Bank of Nova Scotia*, 51 Misc. 2d 689, 273 N.Y.S.2d 700, 703-04 (Sup. Ct. 1966), *aff'd*, 29 A.D.2d 847, 289 N.Y.S.2d 389, *cert. denied*, 393 U.S. 982 (1968).

[68] *United States v. First Nat'l City Bank*, 379 U.S. 378, 405 & n.27 (1965) (Harlan, J., dissenting). In upholding an injunction against repayment of a foreigner's deposit with a foreign branch of a U.S. bank, the Court in *First National City Bank* did not address the question of the nature of the branch deposit relationship, as it

explained, depositors at foreign branches of U.S. banks have no present right to collect their deposits from the home office in the United States. Rather, the depositor's right against the home office is only "a conditional right to payment in New York [the home office] in the event that a demand made upon the [foreign] branch where the account is maintained was wrongfully refused."[69] Where a foreign branch's refusal to repay a deposit is the result of a foreign government's order, the refusal cannot be "wrongful," and no claim against the bank's home office arises.[70]

Despite the general consistency between these customary common law principles and the federal rule on the allocation of foreign sovereign risk, there are important reasons not to rely solely upon the law merchant as the basis for decision. The first is that such an approach would allow individual states and foreign sovereigns to adopt statutory or common law rules harmful to federal interests. Second, as discussed above, both federal regulators and international banks require uniformity, which cannot possibly be provided if these issues turn on diverse state and foreign laws. Third, given the clarity of federal law allocating of sovereign risk, litigation over complex and potentially uncertain issues of state or foreign common law would be highly wasteful and inefficient.

This case provides an apt illustration. WFAL/Singapore filed suit against Citibank more than six years ago in an effort to impose liability on a U.S. bank for deposits that the Philippine government has refused to allow the bank's Manila branch to repay. As noted above,

concluded that the federal courts had jurisdiction over the person of the account holder.

[69] *Id.*

[70] *Id.* at 396 ("If the refusal to pay . . . is proper under the Uruguayan law which governs the contract, there can be no breach which would give rise to a cause of action in New York").

and as the Solicitor General acknowledges, the system of federal banking regulation would be frustrated by any ruling imposing the risk of this foreign sovereign interference on Citibank's home office.[71] Yet the district court has twice imposed liability on Citibank—once under Philippine law (Pet. App. 35a) and once under New York law (*id.* at 24a). It is time to assert the federal interest and settle the issue now.

The need to settle the issue is further illustrated by two recent federal court of appeals decisions. In *Vishipco Line v. Chase Manhattan Bank, N.A.*, the Second Circuit imposed home office liability (where invading North Vietnamese forces interfered with the operation of a Chase branch in South Vietnam) because under New York law, "[b]y operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch."[72] The *Vishipco* decision has been repeatedly characterized as incorrect by the U.S. Government[73] and scholarly commentary.[74] Yet the Sixth Circuit only recently followed *Vishipco* in *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), holding (under Vietnamese law and generic common law principles) that

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[71] U.S. Am. Br. for Cert. at 9, 18.

[72] 660 F.2d 854, 863 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

[73] *See* Brief for the United States as *Amicus Curiae* on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 10, *Vishipco, supra*; U.S. Am. Br. for Cert. at 10-11; Clearing House Am. Br. at 9-10.

[74] Leech, *International Banking: Effects of Nationalizations and Exchange Controls*, 8 J. Comp. Bus. & Cap. Mkt. L. 123, 132-35 (1986); Note, *Holding U.S. Bank Home Offices Liable for Deposits in Their Foreign Branches*, 11 Fordham Int'l L.J. 621 (1988); Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 Colum. L. Rev. 594, 616 & n.136 (1986); Warden, *Choice of Law and Act of State Questions in International Banking Transactions*, in Private Investors Abroad-Problems and Solutions in International Business in 1984, at 288-91 (1985).

"impossibility of performance in Vietnam did not relieve Citibank of its obligation to perform elsewhere. Citibank had accepted the risk of such an obligation by operating a branch in Vietnam." 850 F.2d at 1170 (citation omitted).

Thus, so long as cases such as these are allowed to turn on general banking principles embodied in state or foreign law, there is no way to adequately protect federal interests with respect to U.S. bank liability for foreign branch deposits. Only a *federal* rule will provide simple and certain protection to federal interests.

IV. STANDARD INSTRUCTIONS ROUTING REMITTANCE OF FOREIGN BRANCH DEPOSITS THROUGH THE UNITED STATES ARE NOT SUFFICIENT UNDER FEDERAL LAW TO SHIFT SOVEREIGN RISK TO U.S. BANKS.

The court of appeals recognized that "a debt on a deposit normally authorizes a demand for the money only at the relevant branch." Pet. App. 6a. It nevertheless held Citibank liable by construing the Eurodollar routing instructions to constitute an agreement that Citibank would repay WFAL/Singapore's deposits in New York in the event that the Philippine government prevented withdrawal in Manila. The court below was plainly mistaken in concluding that boilerplate remittance instructions constituted the sort of express agreement necessary to overcome the normal allocation of foreign sovereign risk. The court's novel interpretation of those instructions is directly contrary to the longstanding federal regulatory practice on which the international Eurodollar market is based. Since virtually all Eurodollar transactions are routed through New York, the court of appeals' error undermines the premise on which the international Eurodollar market operates.

Federal regulators have long held that the federal allocation of sovereign risk cannot be shifted absent a guarantee or comparably *express* agreement. Only an unequivocal assumption of liability can provide the cer-

tainty needed to determine whether any given deposit is subject to the panoply of domestic banking requirements. Thus, the U.S. government has consistently taken the position that foreign depositors bear the risk of foreign sovereign interference "when that risk was not *specifically* assumed through a head office guarantee or an *express* contractual commitment."[75] The same requirement is reflected in federal regulations: "[w]hen payment of a deposit in a foreign branch is guaranteed by a promise of payment at an office in the United States if not paid at the foreign office, the depositor no longer assumes this [foreign sovereign] risk. . . ." 12 C.F.R. § 204.128(c) (1989).

The court of appeals nowhere suggested the existence of any express agreement between WFAL/Singapore and Citibank. To the contrary, the court found that Citibank had agreed to repay WFAL/Singapore's deposits at its home office in New York based upon a single fact: the inclusion in the telex confirmations of routing instructions referring to WFAL/Singapore's account in New York. The court below did not rely upon any commercial understanding that treats such standard routing instructions as creating a rule of liability, nor did it dispute the district court's factual finding that this language did not reflect any agreement between the parties with respect to Citibank's obligations in the event the Philippine government ordered Citibank/Manila not to repay the deposits.[76] Rather, the court of appeals merely concluded that the cursory confirmation language meant that Citi-

[75] Letter from the United States as *Amicus Curiae* to the Court of Appeals for the Second Circuit (June 14, 1988) at 2 (emphasis added). *See also* U.S. Am. Br., below, at 22 ("as a matter of U.S. law and policy, a depositor making a deposit at a foreign branch—and in the absence of an *explicit guarantee* by the head office—must assume the sovereign risk that the foreign country will restrict repayment") (emphasis added).

[76] *See, e.g.*, Pet. App. 19a ("the contract was silent" on the issue whether Citibank would repay WFAL/Singapore's deposits out of the assets located outside the Philippines); U.S. Am. Br. for Cert. at 8-9.

bank, in some sense, would "repay" the deposits in New York and that this was sufficient to alter the normal allocation of sovereign risk.

As the Solicitor General explained in his *amicus* brief in support of *certiorari*,[77] the court of appeals was demonstrably wrong in its unprecedented finding that the language in the telex confirmations represented an agreement to shift sovereign risk from the foreign depositor to the U.S. bank. Such remittance instructions have an entirely different purpose in the Eurodollar market. *See* discussion above at p. 5. In fact, remittance instructions may be unilaterally changed at the last minute by one party (such as WFAL/Singapore) simply sending a telex requesting that the funds be transferred elsewhere. As the district court correctly held, routing instructions simply do not reflect any agreement as to the allocation of foreign sovereign risk.[78]

Furthermore, the court of appeals' interpretation of the parties' routing instructions ignores decades of federal regulatory practice and undermines the premises of the Eurodollar market. Instructions routing repayment though New York exist in virtually all Eurodollar deposits. In 40 years of regulating foreign branehes and their participation in the Eurodollar market, Congress and federal regulators have never considered such instructions sufficient to make these deposits payable in the United States. Indeed, the very definition of Eurodollar deposits—like those in this case—is deposits that are *not* payable in the United States.[79] If left standing, the court of appeals' interpretation of the routing instructions in this case would radically redefine the term "payable only abroad" for virtually all Eurodollar deposits, making such deposits payable for the first time in the United States. This would in effect bring Eurodollar deposits "on shore," leaving uncertain their long-standing exemption from fed-

[77] U.S. Am. Br. for Cert. at 16-17.

[78] Pet. App. 16a-17a.

[79] *See* p. 4 & n.5, *supra*.

eral regulatory requirements governing reserves, FDIC insurance, interest rates, and the like.

Contrary to the court of appeals' ruling, standard Eurodollar routing instructions have *nothing* to do with the allocation of sovereign risk, and there is no evidence that the routine telexes in this case were ever intended to impose liability on Citibank in the event that the Philippine government prevented Citibank's Manila branch from repaying the WFAL/Singapore deposits. Accordingly, those routing instructions do not constitute an express agreement to shift sovereign risk to the home office of a U.S. bank, and that risk resides where the federal rule places it—on the foreign depositor.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S

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No. 88-1260

In The

Supreme Court of the United States

October Term, 1989

CITIBANK N.A.,

Petitioner,

vs.

WELLS FARGO ASIA LIMITED,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

Petitioner's two questions beg the questions, for they rest upon misstatements of both the Philippine government decree and the principles of local contract law that have animated this case from its first day. Accordingly, the questions actually presented are these:

1. Did the court of appeals err in affirming the district court's finding that the Philippine decree (MAAB-47) has no effect upon petitioner's obligations to perform acts outside of the Philippines, Pet. App. 7a, and thus the decree did *not* "prevent" petitioner from repaying its debts to respondent, and did *not* "take or freeze" those debts?

2. Did Congress either (a) affirmatively preempt local law governing the contractual relationships of banks and depositors, e.g., *Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 145 N.E. 917 (1924), or (b) delegate to the Federal Reserve Board the power to preempt ("displace," Pet. Br. 16) local *corpus juris*, and if so, did the Board unambiguously exercise that power?

3. As a matter of last resort, should this Court now "displace" local law by promulgating a new and retroactive rule of "federal common law"?

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WELLS FARGO ASIA LIMITED,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Some of the statements in petitioner's brief are correct, but others are less candid. We therefore begin with first principles.

A. The Contracts and the Debtor-Creditor Relation of the Parties

Deposit accounts are simply loans by depositors to banks, under which the parties' relationships are governed by traditional rules of local contract law. *See, e.g., Anderson National Bank v. Luckett,* 321 U.S. 233, 248 (1944). So it was that in June 1983, respondent Wells Fargo Asia Limited ("WFAL") loaned $2 million to petitioner

Citibank, N.A.[1] It did so by placing two $1 million (U.S.) deposits with Citibank, N.A. at New York, each for a term of six months. No satchel of greenbacks changed hands, as the funds being lent were readily available to WFAL at its account at another New York bank. Accordingly, WFAL simply advised Citibank:

> We shall instruct Wells Fargo Bk. Intl. New York to Pay Citibank N.A., 399 Park Avenue, New York 10022 USA. Please pay to our [account] with Wells Fargo Bk. Intl. New York. Pet. App. 47a.

Citibank accepted the deposits and agreed to remit principal and interest at maturity, in these words:

> At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Int'l Corp. NY through Citibank New York. Pet. App. 3a.

Thus, the two deposit contracts were made, as the parties' other writings similarly used the words "pay" and "remit" interchangeably. Pet. App. 3a, 15a-16a, 46a-47a.

Unlike "demand" deposits such as ordinary savings accounts, these arrangements did not require WFAL to demand repayment or present a passbook at New York, Manila, or anywhere else. Citibank's obligation to repay – that is, to "remit to your account" at New York – was unconditional and triggered simply by the passage of time. Pet. App. 19a, n.6. Citibank denominated these deposits as ones "booked" at its Manila branch office, meaning that after it accepted the funds in New York, Citibank transferred them to its Manila branch.

[1] Like Citibank, N.A. (but not "Citibank/Manila"), respondent WFAL is a corporation. Its parent is Wells Fargo & Company, whose shares are publicly traded. Other affiliates (Rule 29.1) are listed at p.1, note 1, of respondent's Brief in Opposition to the Petition.

Unless otherwise stated, all emphasis in quoted materials has been supplied.

Thereby, the funds were not a part of our domestic money supply, the regulation of which is now the *sole* office of reserve requirements imposed by the Federal Reserve Board. *See* 12 U.S.C. §461(b)(2)(B) (reserves shall be imposed "solely for the purpose of implementing monetary policy"; Pet. App. 56a).

We are told that, by this arrangement, Citibank was able to offer a somewhat higher rate of interest than would have been the case had the funds been "booked" at a United States branch.[2] Pet. Br. at 7.[3] Whether or not this is true, it is irrelevant to the issue of "sovereign risk" upon which Citibank's case is built. As the district court found, the interest rate that Citibank agreed to pay on accounts booked "in secure localities, such as London" was the same as that paid by Citibank on deposits booked "in presumably riskier places, such as Manila." Pet. App. 36a. Thus, the district court observed that Citibank "must have known that its depositors were not taking any sovereign risk, or didn't think they were." J.A. 36.

In any event, however, none of these facts created a creditor-debtor relationship between WFAL and the chimera whimsically referred to as "Citibank/Manila." Such branch-based appellations were termed "silly" by the trial court, J.A. 62, and for good reason: The moment Citibank accepted WFAL's deposit at New York, Citibank itself became indebted to WFAL, without regard to the branch at which the deposits were "booked". This is elementary, for

[2] This is not wholly accurate, since International Banking Facilities are in the United States, yet generally are not subject to reserve requirements even though they pay so-called Eurodollar rates of interest. These Facilities are discussed in Section II of the brief *amicus curiae* of Bank of Montreal, *et al.*

[3] Citations to petitioner's Brief are to the typewritten version received by us on January 19, 1990. When petitioner files its printed brief, there may be a slight change in pagination.

> It is true that there is no separate corporate entity as between the parent bank and its [foreign] branch. A deposit liability of a branch is, therefore, a liability of the parent bank . . . [4]

B. Citibank's Assets, as Distinguished from Its Debts

As is the custom of all banks, Citibank then invested the deposited funds in whatever assets it chose. It was at liberty to make loans to a Philippine farmer or a Japanese computer manufacturer, to fund a letter of credit in favor of General Motors or IBM, or to invest in the myriad of other opportunities open and available to it. So far as Citibank chose to invest in the Philippines and other nations whose economies were unstable, it alone bore the risk of those decisions, and it alone reaped the higher rewards that are a natural product of economic instability.

WFAL for its part had no claim to any of Citibank's assets, had no right to control Citibank's investment strategy, and had no right to share in the rewards. It therefore bore none of the risk of Citibank's investments. As Judge Cardozo explained for the court in *Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 166, 145 N.E. 917 (1924):

> The defendant is not a bailee for the plaintiff, nor were any of its assets earmarked for the plaintiff's use. * * * The *res* belonging to the plaintiff was not a physical object committed to the defendant's keeping, but an intangible right, a chose in action, the right to receive rubles in the future under an executory contract.

This principle is also elementary, yet Citibank persistently refuses to acknowledge *any* distinction between its debt to its depositors and its own assets. All of its arguments are but an effort to bring about a new rule, excusing repayment of debts so long as assets are subject to any sovereign restrictions whatever.

Citibank classified its assets according to the branch office that originated the loan or other investment.

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[4] Federal Reserve Bulletin, Jan. 1918, at 1123, J.A. 84.

Those originated at its Manila branch were denominated as assets "booked" at Manila, those originated at London were "booked" there, *et cetera*. Among Citibank's worldwide assets, whether "booked" at Manila or elsewhere, only a tiny fraction were loans to Philippine nationals or other investments in Philippine enterprises. These the district court referred to as Citibank's "Philippine assets," all others being its "non-Philippine assets." The assets "booked" at Manila included both Philippine and non-Philippine loans and other investments. Pet. App. 23a, 30a-31a.

C. MAAB-47 and Petitioner's Misunderstanding of that Decree

After respondent's deposits were made with Citibank, but before they matured, the Philippine Central Bank informed the international financial community that, because of a shortage of foreign exchange, foreign currency payments by Philippine borrowers were temporarily suspended until the debt could be restructured. J.A. 31. There followed a decree of the Philippine Central Bank that came to be known as MAAB-47, Pet. App. 63a. While petitioner and the United States devote many pages to the economic conditions surrounding MAAB-47, they say precious little about its actual effect.

As shown by the evidence at trial, Citibank's response to MAAB-47 caught everyone by surprise. Citibank initially informed its depositors that it "would like" to repay its debts, but that it could not do so without violating "the spirit of the moratorium." J.A. 397-98. In the words of the trial judge, Citibank's depositors reacted with "outrage and despair." J.A. 354. In an attempt to mollify them, petitioner then asserted that MAAB-47 prevented repayment, but offered to increase the interest rates being paid in order "to reflect the Philippine sovereign risk that *you are taking*." *E.g.*, J.A. 400-01.

But no such "sovereign risk" was ever before taken by Citibank's depositors. As the district court observed at the close of trial:

> It seems to me that Citibank must have known, having found that fact that interest rate was identical [at both London and Manila], Citibank must have known it, and it must have known that its depositors were not taking any sovereign risk, or didn't think they were.
>
> And that is borne out to some extent by the letter than Citibank wrote to the plaintiff long before this litigation started, offering as I recollect a percentage and a half extra rate, extra interest for the assumption of sovereign risk.
>
> Obviously, whoever wrote that letter didn't think that plaintiff had assumed sovereign risk before they wrote that letter . . . [because] they wouldn't offer to give them an increased interest rate to assume a risk that they had already assumed. J.A. 36.

As well, the "sovereign risk" that Citibank unsuccessfully attempted to shift to its depositors had nothing to do with the "taking" or "freezing" of their deposits, i.e., Citibank's debts to those depositors. As the evidence unfolded at trial, it turned out that the Philippine Central Bank had no objection to Citibank's repayment of its debts, only so long as it did not do so with proceeds obtained from the liquidation of Citibank's "Philippine assets," wherever "booked."

When Citibank eventually sought permission to apply its non-Philippine assets toward debt repayment, the Central Bank readily agreed. As the district court found, the testimony of both petitioner's expert (Giddy) and a "Citibank/Manila" officer (Buenaventura), along with a Philippine Central Bank telex, all confirmed that

> The Philippine government's concerns are not implicated by repayment with funds held by banks not domiciled in the Philippines (or, presumably, by calling in loans made to non-Philippine entities). Since these assets are already

> located outside the Philippines, and therefore are not part of the country's foreign exchange reserves, there is no outflow of foreign currency. Pet. App. 34a.

The same conclusion followed as to Citibank's other non-Philippine assets:

> The Central Bank's reasoning is obvious: assets carried on the books of Citibank's non-Philippine offices have no connection with the Philippines . . . and the Decree does not prevent transfer of such assets from outside the Philippines to Manila in order to repay the deposits. *Id.*, 35a.

The court of appeals reached the same essential conclusion, Pet. App. 7a (last sentence); these findings moot the question whether Citibank's obligation was also payable at New York or only "outside the U.S.A." for MAAB-47 was simply a temporary limitation upon – and only upon – the liquidity of Citibank's Philippine assets.

Treating these findings not as the "main event" but as a "tryout on the road" to appeal, *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-76 (1985), Citibank now backpedals, saying:

> Citibank/Manila petitioned the Philippine government for a waiver of the restrictions imposed by MAAB-47. The government *ultimately denied the waiver, except* to permit Citibank/Manila to use its U.S. dollar funds held outside of the Philippines to repay the dollar deposits. Pet. Br. 9.

But this it not forthright, for Citibank never sought a plenary waiver of MAAB-47 by the Philippine government. Rather, petitioner carefully confined itself to a request to use only those non-Philippine assets "booked" at Manila to repay its debts. It assiduously avoided asking permission to apply other of its non-Philippine assets toward repayment. Thus, the Philippine government did not "ultimately deny" the latter request, for such was

never made. Still further, when the Philippine government learned of Citibank's position, it notified the parties, *"specifically disavowing any objection to discharging the remainder of the obligation using funds* [assets] *from Citibank's non-Philippine offices."* Pet. App. 35a, quoting Pl. Ex. 59. Thus, the district court found:

> There is nothing in the record to suggest that Citibank made the slightest effort to obtain such consent. On the contrary, everything suggests that approval would have been readily granted if requested. Pet. App. 37a.

By obtaining Central Bank approval to repay through the use of any of its non-Philippine assets, Citibank succeeded in demonstrating that MAAB-47 did not "prevent" repayment, and did not "take" or "freeze" its debts to its depositors. The purpose of the MAAB-47 moratorium was simply to prevent the outflow of funds from the Philippines. However, so long as Citibank did not generate funds for repayment by liquidating its Philippine assets, it could repay its debts in full without any adverse effect upon the foreign exchange position of the Philippine nation. That is why petitioner's "Questions" here are misstated; its persists in its claims that MAAB-47 "prevents" it "from repaying those deposits" (Question 1), and that the deposits "were taken or frozen" by that decree (Question 2). As the full trial showed, neither proposition is true.

D. Proceedings Below

In response to WFAL's complaint, J.A. 15-18, Citibank's answer tendered two affirmative defenses, based upon MAAB-47. The first was impossibility of performance, i.e., that MAAB-47 "prevented" Citibank from "remitting the full amount of principal due under the . . . Deposits." J.A. 21, ¶22. As already shown, that defense failed upon the finding that the decree did not prevent Citibank from applying its non-Philippine assets toward full repayment. Pet. App. 37a.

Petitioner's other affirmative defense asserted that respondent "assumed the risk" of MAAB-47. J.A. 22, ¶27. By "risk," Citibank meant what it calls sovereign risk, and which it treats as an indivisible whole – any action by a sovereign, of whatever character, is a "risk" that always must be assumed and borne by its depositors. When WFAL moved for summary judgment, Citibank shed a little more light on this subject. It said that it could prove a "custom and practice" among international bankers, amounting to a universal understanding that conditioned the depositor's right of repayment on the absence of sovereign action at the particular branch where the deposit is booked. Pet. App. 43a, 50a. Accordingly, summary judgment was denied.

After a full trial, the district court found that Citibank had not proved any such custom or practice. Pet. App. 35a-36a. On this subject, the district court observed that Citibank "must have known that its depositors were not taking any sovereign risk," J.A. 36, and that petitioner "jealously guarded – almost like a trade secret – its belief that everybody was taking sovereign risk." J.A. 37.

The district court assessed the entirety of the trial, and the issues in the case, thus:[5]

> the dispute in this case – to which most of the trial was devoted in the guise of "sovereign risk" – boils down to one question: is Citibank obligated to use its worldwide [non-Philippine] assets to satisfy plaintiffs' deposits. In other words, the dispute is not so much about where repayment physically was to be made or where the deposits were collectible, but rather which

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[5] The court of appeals did not fault the findings or reasoning of the district court. The appellate opinion specifically notes that the decree "only prevented" Citibank "from repaying the deposits with its Philippine assets," Pet. App. 4a, i.e., with funds obtained by liquidation of loans and other investments in the Philippines.

assets Citibank is required to use in order to satisfy its obligation to plaintiff. Pet. App. 19a.

The court of appeals sought to simplify the case still further. By supplemental fact finding, the district court determined that the deposit contracts required Citibank to repay at New York, Pet. App. 18a, 26a. This fact necessitated affirmance "[s]ince MAAB 47 has no effect on a bank's obligations to perform acts outside of the Philippines. . . ." Pet. App. 7a.

Contrary to the suggestions of Citibank and the United States, the district court's finding of an obligation to repay at New York did not rest exclusively upon the written language of the confirmation slips exchanged by the parties. Testimony of the principals and their experts confirmed this understanding. WFAL's Cole testified:

> At maturity, it was equally clearly specified in the confirmation slips. It was to be paid by Citibank N.A. to Wells Fargo Bank International for the account maintained there by WFAL . . . in New York.
>
> * * *
>
> Q. Would you say that this was the agreement between the parties . . . in this particular case?
>
> A: Yes. J.A. 228.

WFAL's expert, Boughey, testified:

> Q: In this particular case, what is your understanding of where the deposits were payable?
>
> A: The deposits were payable in New York. J.A. 239.

Citibank's Howard, its chief financial officer, confirmed that this was the agreement.

> Q: You understand, don't you, that in this case the deposits were to be repaid to WFAL's account with Wells Fargo Bank International, what is known as WFBI, in New York?
>
> * * *
>
> A: Yes.

> Q: You would agree, won't you, that the funds were to be transferred from Citibank in New York to Wells Fargo Bank in New York? Yes or no?
>
> A: Yes. J.A. 266.

Moreover, during argument in the district court, Citibank's counsel urged that the place of repayment was irrelevant. When the district court inquired as to Citibank's ability to pay at Manila by transferring non-Philippine funds to its Manila branch, counsel for Citibank replied,

> Why should they go through the circuitous process? They could pay them directly. . . .If Citibank could, which it can, send the money to Manila, why wouldn't it just pay them direct? J.A. 64-65.

Counsel's point was simply this: Once the evidence failed to prove a custom and practice limiting Citibank's repayment obligation to Philippine assets "booked" at Manila, Citibank had the ability and obligation to repay at Manila. Repayment at New York simply would be substitute performance dispensing with the unnecessary circuity of physical performance at Manila. "Just pay them direct" means – and could only mean – repaying WFAL at New York, as the contracts specified and as the parties understood.

SUMMARY OF ARGUMENT

Petitioner's Questions, and its entire case, are bottomed upon two false premises squarely contradicted by the evidence, findings, and law embodied in the judgments below.

First, petitioner insists that MAAB-47 "prevented" repayment of its debts (Question 1) because the deposit accounts reflecting those debts were "taken or frozen" by the Philippine Central Bank (Question 2). Thereby, petitioner seeks to treat the decree as something akin to governmental attachment, garnishment, or expropriation of *respondent's* property, i.e., respondent's "chose in

action, the right to receive [dollars] in the future under an executory contract." *Sokoloff v. National City Bank of New York, supra,* 239 N.Y. at 166. But as already shown, the district court found that this is not what happened, and it was at pains to distinguish this case from ones truly involving expropriation or other taking of respondent's property. Pet. App. 21a-22a; again, 37a-38a. It found that MAAB-47 did not take or freeze the deposits, that the decree merely imposed a temporary restraint upon the liquidity of petitioner's assets in the Philippines, that petitioner remained both free and obligated to repay its debts through the use of other assets at its disposal, and that no law, contract, custom, or practice requiring a different result was ever proved. Pet. App. 23a-24a, 34a-36a.

Second, petitioner now recycles its disagreement with the trier of fact under the slogan "sovereign risk," which to petitioner means a unitary whole, indivisibly consisting of any form of sovereign action whatever. But the law rejects this premise; its proceeds from the truth that actions by sovereigns are not all of one kind, and so the "risk" in question properly turns upon the specific nature of the action actually taken by the sovereign. These principles of local law, which we discuss, Part I, *post*, with reference to New York precedents, show that (1) when the sovereign, as here, takes or freezes a bank's assets, such action does not relieve the bank of making full restitution to its depositors, *Sokoloff v. National City Bank of New York, supra;* and (2) where the sovereign in fact attaches, garnishes, or expropriates the *depositor's* property, and the bank pays over the funds to the sovereign, the bank does not have to pay a second time unless it has agreed with the depositor that it will do so: *compare e.g., Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984) (no agreement to "pay twice"), with *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984) (agreement to "pay twice").

We begin with these principles of local law because they inform the Court as to what it is that petitioner asks

it to do. As stated at Pet. Br. 16-17, Citibank's entire case rests upon the proposition that:

> As a matter of either preemption or federal common law, the federal rule allocating sovereign risk to foreign depositors *must displace* state or foreign law rules that would make U.S. banks liable for foreign branch deposits when foreign governments prevent their repayment by foreign branches.

But as there was no "prevention" of repayment, and there is no concept of any unitary "sovereign risk," the case founders on the false premises and the findings discussed above. But even if it did not, deposit contracts are creatures of local law governed by that *corpus juris*. No Act of Congress creates or modifies such contracts, no Act dictates that any kind of sovereign "risk" must be assigned to one party or to the other, and no Act "displaces" local law that governs the contractual relationship of the parties.

The Acts to which petitioner calls attention do not rebut the "presumption against finding preemption of state laws in areas traditionally regulated by the States," *California v. ARC America Corp.*, ___ U.S. ___, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86, 94 (1989), do not "signal an intention to preempt," and do not provide the other indicia from which Congressional intent to preempt may be inferred, *Northwest Central Pipeline Corp. v. State Corporation Comm'n*, ___ U.S. ___, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509, 527 (1989), collecting the authorities. In 12 U.S.C. §461(b)(6), Congress used the words "deposits payable only outside the . . . United States" simply to describe one category of banking transactions not ordinarily involving domestic "monetary policy," the implementation of which is the sole office of reserves imposed under the authority of 12 U.S.C. §461(b)(2)(B). But in 12 U.S.C. §461(b)(5)(B), Congress itself recognized that the words of subpart (b)(6), do not create an all-purpose exemption from reserve requirements, and so provided

that domestic assets evolving from deposits payable abroad should still be within the reach of Federal Reserved Board reserve requirements. To read the language of Section 461(b)(6), or counterpart words of 12 U.S.C. §1813(*l*)(5)(A), as signaling Congressional intent to preempt the whole of local law governing contractual relationships between depositors and banks is not less than to find preemption by "extravagant interpretation" of Acts of Congress. *Northwest Pipeline Corp., supra,* 109 S.Ct. at 1275, 103 L.Ed.2d at 529. *See post,* Part II.

Petitioner's resort to a 1987 Board "interpretation" of its Regulation D (a regulation that simply parses the words of 12 U.S.C. §461(b)(6)) is equally unimpressive. The interpretation was not even on the books when the events of this case arose, and it deals largely with guarantees given by banks against sovereign expropriation of depositors' property, such as the guarantee given by the bank in *Garcia v. Chase Manhattan Bank, N.A., supra.* As early as 1980, the Board was advised of the quite different rule of law (*Sokoloff, supra*) that applies when bank assets are taken, and the Board declined to take any steps to "displace" that rule. So the 1987 interpretation is anything but an "unambiguous" declaration of agency "intent to pre-empt" local rules of contract law, and was not in any event issued by an agency upon which Congress has bestowed broad powers to exempt banks "from being forced into the state regulatory mold." *Fidelity Savings & Loan Ass'n v. De La Cuesta,* 458 U.S. 141, 158, 161-62 (1982). *See post,* Part III.

Finally, all else having failed to exonerate it from its obligation to repay its debts, petitioner invites this Court to do so under the guise of creating a "displacing" rule of federal common law. The United States does not join in this request, U.S. Br. 21, and for good reason. Federal common law is created in few and limited instances involving "uniquely federal interests" that are threatened by use of state or local law. Traditionally, the rights and

liabilities of the United States have been directly at issue in those cases in which federal common law is invoked or considered. In contrast, private contract disputes, such as this case, are not appropriate subjects for federal common law. These rules are reflective of the requirement of unique federal interests. Banking and bank regulation is not "uniquely federal," but a field long marked by dual regulation. Citibank's invocation of "foreign commerce and foreign relations interests" does not trigger any specific or tangible federal interest which would be advanced by displacing local law. There is no regulatory imperative necessitating federal common law. And, finally, if there is a need to re-examine certain aspects of the use of local law in banking transactions, Congress and bank regulators are better equipped to make the necessary policy judgments. Indeed, the failure of Congress and the regulators to preempt local law after decades of consistent use strongly counsels against an abrupt judicial change.

ARGUMENT

Since the demise of *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842), this Court does not sit in review of rulings of local law. Accordingly, the district court's finding that MAAB-47 did not "take" or "freeze" WFAL's deposits, but instead affected only the liquidity of Citibank's "Philippine assets," is neither reviewable nor challenged by petitioner or the United States. And Citibank admits that if its assets were lost, stolen, or rendered worthless, neither federal nor local law would excuse petitioner's repayment of its debts. Pet. Br. 20, n.16. But if Citibank's assets are "taken or frozen" by a foreign sovereign, petitioner sees things differently, contending that a

> federal rule allocating sovereign risk to foreign deposits *must displace* state or foreign law rules that would make U.S. banks liable for foreign branch deposits . . . Pet. Br. 16-17.

In truth, federal statutes and regulations neither preempt nor attempt to displace local law in this fashion. Petitioner's obligations to its creditors are not established in or limited by federal law; they are governed by the state and other local law that has animated this case from its first day. Federal legislation does not provide for a comprehensive legal scheme for the whole country, and local laws on many matters are necessarily applicable to national banks. This Court's words of a century ago, in *First National Bank of Louisville v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870), have never been doubted:

> They [national banks] are subject to the laws of the States, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the state law incapacitates the banks for discharging their duties to the government that it becomes unconstitutional.[6]

In these circumstances of dual regulation, there is a strong "presumption against finding preemption of state laws in areas traditionally regulated by the State," *California v. ARC America Corp.*, ___ U.S. ___, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86, 94 (1989), and doubly so here, for petitioner's "displacement" argument is based primarily on agency interpretation, rather than Congressional action. *See Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 374 (1986).

Properly viewed, Citibank's effort to avoid its debts by resort to a *post hoc* rule of preemptive federal law is simply this: The Court is asked to convert each of petitioner's foreign branches into *de facto* subsidiaries,

[6] See, also, *Anderson National Bank v. Luckett, supra*, quoted *post*, p. 31.

thereby to achieve a result that Citibank was unable to obtain either in arms-length negotiations with its depositors, or by evidence at the trial establishing a custom and practice limiting liabilities to the liquidity of assets "booked" at a particular branch.

This Court should not rewrite petitioner's contracts or displace the principles of local law that inform those agreements. The banks participating in the so-called Eurodollar market are sophisticated entities quite able to fend for themselves. To insist upon a federal rule displacing the norm is to impoverish banks' abilities to assess and deal with risks as they choose, and thus to introduce the inefficiencies that are the inevitable product of every restraint upon the operation of free markets. When Citibank accepted WFAL's deposits, the rate it quoted was the same at every foreign branch. But as the district court noted, in those few instances when Citibank revealed the position it now advances here, "there is no suggestion in the record that anybody who ever got that information ever made a deposit except [in] London." J.A. 37. If Congress wishes to perpetuate such market disruptions, it is free to do so, but it has not done so, and this Court is ill-advised to enter the fray. As the United States admonished in its brief *amicus curiae* in *Citibank, N.A. v. Trinh*, No. 88-1031 pending, at p. 19, note 6:

> Indeed, we are not aware of any judicial decisions that question whether a 'uniform federal rule' governs these disputes. We submit that this Court, which would have the last word on the question, should not be the first court to address it.

I

AS THE PHILIPPINE DECREE INTERDICTS ONLY PETITIONERS ASSETS, IT DOES NOT EXCUSE REPAYMENT OF DEBTS

Before turning to petitioner's "questions" of federal law preemption, it is appropriate to begin with the local

law whose displacement is sought. A major vice of petitioner's argument is the failure to recognize that "sovereign risk" is not some unitary whole. Sovereign action comes in many forms, and courts give meaning to this truth by fashioning legal principles that rest upon an identification of the particular *res* that is the subject of a particular sovereign act. Although we illustrate the point by reference to the New York precedents upon which the district court rested its judgment, Pet. App. 20a-22a, it earlier found that Philippine law leads to the same conclusions, Pet. App. 32a-34a. Citibank does not challenge either finding or suggest "conflict" requiring further resolution. The United States quarrels somewhat about Philippine law, but then concludes that

> In the absence of preemptive federal law, we agree that New York courts would have the power to create a cause of action against New York based banks that does not exist in the country where the bank's foreign branch is located. And indeed, the New York Court of Appeals apparently exercised that power in *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924). . . . (U.S. Br. 25).

To that decision we now turn.

A. *Sokoloff* – the Taking (or "Freezing") of Bank Assets Does Not Extinguish Debts

Interbank deposits are contracts. The deposit contracts here contain no express term rendering the promise to repay WFAL dependent upon assets being available to Citibank in the Philippines. Instead, Citibank, N.A., unconditionally promised to repay WFAL, at New York, upon maturity of the deposits. Citibank set out *but failed* to prove a different agreement: that repayment of the interbank deposits was implicitly conditioned upon Citibank's access to assets booked at the Manila branch. In the absence of such a different agreement, a bank deposit

is not a bailment. The depositor looks to the bank, and all of its resources, for repayment at maturity.

This is not new law, but simply the application of the settled principle that a bank's assets are not "ear-marked" for the use of particular depositors and that, from the depositor's perspective, the debt is simply "a chose in action, the right to receive [dollars] in the future under an executory contract," *Sokoloff v. National City Bank of New York, supra*, 239 N.Y. at 166. As Judge Cardozo then explained, *id.* at 167, referring to petitioner here:

> Plaintiff did not pay his money to the defendant [bank], and become the owner of this chose in action, upon the security of the Russian assets. He paid his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere. Everything in Russia might have been destroyed by fire or flood, by war or revolution, and still the defendant would have remained bound by its engagement.

The vitality of the *Sokoloff* rule is one of the means by which United States banks compete in the international marketplace. As the court in *Vishipco Line v. Chase Manhattan, Bank*, 600 F.2d 854, 863 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982), found:

> U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them then they would be in a locally incorporated bank. [Citation omitted]. Indeed, the national policy of South Vietnam, where foreign banks were permitted to operate only through branches, was to enable those depositing in foreign branches to gain more protection than they would have received had their

money been deposited in locally incorporated subsidiaries of foreign banks.[7]

Citibank confuses the issue by referring repeatedly to the "situs" of the deposits, as if the intangible "location" of the deposits somehow limits the scope of its obligation under the deposit contracts. But the place for "payment," "collection," "clearing," "demand," or otherwise, has no modifying effect upon the extent of the promise made to repay. Illiquidity at a branch does not extinguish the institutional promise to repay with other funds at its disposal. Such extinguishment occurs only if the "promise" to repay a deposit is a very conditional one, limiting repayment to the liquidity of assets situated or booked at a particular office. Such a limited undertaking by a bank is unusual and must be specifically proved. Citibank's custom and practice evidence was offered to prove such a limitation, effectively abrogating the *Sokoloff* rule, but the evidence did not persuade the trier of fact. Pet. App. 35a-36a.

In sum, the *Sokoloff* rule is the norm when bank assets (rather than debts to depositors) are "taken or frozen" (Question 2 in the Petition). As a matter of either New York or Philippine law, MAAB-47 simply did not have the effect claimed for it here.

B. The *Perez* Rule: Where Debts Owed to Depositors Are Attached, a Bank Need Not Pay Twice

Just as *Sokoloff* prescribes one rule for one kind of case, so it is that another and different rule of local law

[7] Petitioner's arguments thus convert the Acts it cites into "schizoid statute[s]," *Business Electronic Corp. v. Sharp Electronic Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 1524, 99 L.Ed.2d 808, 822 (1989). It argues that 12 U.S.C. §461 and §1813 are intended to improve the competitiveness of U.S. banks doing business aboard by relieving them of the costs of maintaining reserves and paying FDIC insurance premiums, *e.g.*, Pet. Br. 22-23. Yet, it argues that the same Acts rob banks of the competitive advantage that accrues under the *Sokoloff* rule.

sometimes terminates a bank's obligation to repay creditors. For example, if the sovereign (or anyone else) garnishes, attaches or expropriates a depositor's account, the bank's debt to the depositor has been taken, and the bank is certainly not required to pay twice. The most recent expression of this rule by New York's highest court is found in *Perez v. Chase Manhattan Bank , N.A.*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 56, *cert. denied*, 469 U.S. 966 (1984). *Perez* involves confiscation of a depositor's account with Chase Manhattan in Cuba. The Court said:

> The issue on appeal was whether Chase is excused from payment to Manas because, in September 1959, the Cuban government confiscated Manas' accounts and Chase surrendered the funds representing the [deposit] certificates. Because the certificates were payable in Cuba and Chase at the time of the confiscation was present there, the Cuban government had the power to enforce and *collect* Chase's debt to Manas in Cuba, and the Act of State doctrine precludes inquiry by this court into the propriety of a confiscation *directed particularly at Manas' assets in Cuba*. Having once made payment, Chase is not liable to pay on the certificates of deposit a second time. *Id.* at 465.

The rule exemplified by *Perez*, like that exemplified by *Sokoloff*, is one of longstanding. The two rules are not in disharmony. Each depends for its application upon the *res* "taken or frozen." In a *Perez* case, the sovereign steps into the shoes of the depositor; the *res* garnished is the deposit itself, which is at once both an asset of the depositor and a debt of the bank. But *Perez* has no application to the present case. Only Citibank's assets, not WFAL's deposits, were affected by MAAB-47. Citibank has not paid over WFAL's deposits to any sovereign, and the Philippine decree does not prevent repayment. That decree merely limits Citibank's ability to liquidate certain of its own assets, such as loans made to Philippine nationals, without prior approval of the Central Bank.

The trial court specifically limited its holding to this situation, saying:

> We have not considered . . . what would have happened in Manila had the Philippine government . . . sought to *expropriate* all or any part of these Deposits, or if it had sought to *confiscate* the assets of any depositor or class of depositors, or had any way *impeded* or sought to impede payment of the Deposits, with non-Philippine assets, to any depositor or class of depositor. Pet. App. 37a-38a.

After remand, the district court added:

> For example, if the Philippines had confiscated plaintiff's deposits, New York courts would interpret the *expropriation as a compulsory assignment* of the depositor's rights, so that payment of the Philippine assignee would discharge the debt. *Id.* at 21a.

These comments make abundantly clear the district court's firm understanding of the difference between the taking or freezing of bank assets (*Sokoloff*), and the freezing or appropriation of a depositor's account, i.e., the bank's debt to the depositor (*Perez*).

The rule stated in decisions such as *Perez* is rooted in the notion that it is fundamentally unfair to expose a bank (or any other debtor) to the risk of double payment of a debt. Indeed, protection against such a risk is now viewed from the perspective of due process. *See Western Union v. Pennsylvania*, 368 U.S. 71 (1961). In earlier days, however, the problem was particularly acute because of the additional problem of delayed communications among various bank offices. Thus, for attachment purposes only, some courts employed the "separate entity" fiction to reach the desired result. For example, in *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (1950), *aff'd*, 282 A.D. 940, 126 N.Y.S.2d 192 (1953), the court said:

> Unless each branch of a bank is treated as a *separate entity for attachment purposes*, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them.

See also, United States v. First National City Bank, 379 U.S. 378, 408 (1965) (Harlan, J., dissenting):

> The State of New York had determined that branch banks should be treated as separate entities, primarily in order to avoid the crippling effects which could result from requiring each branch to be aware of and liable to make payments to depositors and garnishing creditors on accounts maintained in other branches.

In the present case the government forthrightly acknowledges that the Court would have to indulge the separate entity fiction in order to relieve Citibank of its obligation to repay its debts to WFAL. It concedes that modern methods of instantaneous communication have mooted that justification for the separate entity fiction,[8] but suggests that the Court regard the fiction as alive and well for other purposes. U.S. Br. 14. But this presents no question of federal law, for the government does not endorse petitioner's demand for creation of a uniform rule of federal common law, U.S. Br. 21, and so the source of any broad-gauge "separate entity" doctrine must be New York or Philippine law. But there simply is no such law; the precedents cited, here and in the lower courts, to substantiate the "separate entity" doctrine involve the attachment, garnishment, levy, or other expropriation of a bank's debt to its depositor. Those cases that explicitly mention the "separate entity" fiction carefully confine it to cases of attachment or other taking of bank deposits. *E.g., Cronan v. Schilling, supra ("separate entity for attachment purposes"); United States v. First National City Bank,*

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[8] *Accord, Digitrex, Inc. v. Johnson*, 491 F.Supp. 66, 68 (S.D.N.Y. 1980, Knapp, J.) (By virtue of modern communications methods, "it is clear that the argument in favor of the rule set forth in 1950 in *Cronin, supra*, is no longer persuasive.").

321 F.2d 14, 21-22 (2d Cir. 1962) (quoting *Cronan* and other attachment cases). As well, when this Court reversed the latter decision, it implicitly recognized that the "separate entity" fiction is one of dubious and limited utility, for the concern is simply one of avoiding "any risk of double liability" on the part of banks or other debtors, *United States v. First National City Bank*, 379 U.S. 378, 384 (1964), citing *Western Union v. Pennsylvania, supra*. This explains why modern expositions of the rule applicable in cases of garnishment, attachment, or expropriation of bank deposits dispense with the fiction of "separate entity" and rest upon the forthright statement that, *e.g.*, "[h]aving once made payment" to the sovereign, the bank "is not liable to pay . . . a second time." *Perez v. Chase Manhattan Bank, supra*, 61 N.Y.2d at 465.

Neither petitioner nor the United States has any quarrel with the *corpus juris* of attachment cases. Instead, they seek federal law "displacement" of *Sokoloff* and kindred decisions, which neither indulge the "separate entity" fiction nor employ any other linguistic devices to exonerate repayment of bank debts when only bank assets are "taken or frozen." As shown, however, these arguments rest upon both a misunderstanding of the Philippine Central Bank decree, and an effort to characterize sovereign risk as a single, indivisible concept. The district court's findings about MAAB-47 are not reviewable under the two-court rule, *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949), and so the contentions that the decree "prevented" repayment of respondent's deposits (Petitioner's Question 1), and took or froze those deposits (Question 2) cannot be maintained without also obliterating the distinctions so carefully made in decisions such as *Sokoloff*, on the one hand, and *Perez*, on the other.

An additional vice of petitioner's argument is the suggestion that the principle established in *Sokoloff* is somehow subject to an additional condition, *viz.*, the existence of an express contract, specifically "guaranteeing" repayment of bank deposits (debts) if the liquidity of bank assets "booked" at a particular branch is affected by

sovereign action. Pet. Br. 16, 47. Of course, this is a precondition not found in New York or Philippine law, and one that was not proved to be a creature of "custom and practice" of the trade. Pet. App. 35a-36a. Moreover, the argument for "express guarantees" rests upon a misunderstanding of *Garcia v. Chase Manhattan Bank*, 735 F.2d 645 (2d Cir. 1984), cited in the opinion below. Pet. App. 6a. To that decision we now turn.

C. "*Garcia* Guarantees": Contractual Modification of the *Perez* Rule

The facts of *Garcia* were identical to those of *Perez*, with one crucial exception. Unlike Perez' assignor, Señor Garcia had the presence of mind to demand an additional term in his deposit agreement with the bank. As found by the jury:

> The purpose of the agreement between Chase and . . . Garcia was to ensure that, *no matter what happened in Cuba, including seizure of the debt*, Chase would still have a contractual obligation to pay [its] depositors upon presentation of their CD's. *Id.* at 650.

As the court of appeals noted, a race to the bank ensues whenever, under the *Perez* rule, the bank's obligation is confined to paying but once. Thus:

> If the understanding was that the debt could be paid by turning over the amount of the debt to the Cuban government if it should win the race to the bank, it is apparent that the deposits would never have been made. *Id.*[9]

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[9] Races to the bank by competing claimants to a deposit are not confined to contests between depositor and sovereign. As a ballad tells:

> "I went down to the bank with my little checkbook,
> "The cashier he gave me the strangest look.
> "He said, 'you ain't got no money, 'cause you're overdrawn,

(Continued on following page)

The *Garcia* case illustrates the mischief afoot in petitioner's statement that the "allocation of sovereign risk cannot be shifted absent a guarantee or comparably *express* agreement." Pet. Br. 47, emphasis in original. But this is all a labor to no purpose. When a rule or decision (or, for that matter, a statute or any other expression of law) supplies a normal principle governing contractual relationships, it is of course necessary for the parties to agree that they shall not be bound by the normal rule, if that is their mutual desire.[10] In order to vary the normal rule of *Perez* and other attachment cases, the parties in *Garcia* had to agree to something different, and as that jury found, they did so.

In the present case, however, it is decisions such as *Sokoloff* that supply the normal rule. As the district court found, citing both *Sokoloff* and *Perez*, New York law provides the general rule that "the parent bank is ultimately liable for the obligation of the foreign branch," but carves out an exception in cases where deposits, rather than bank assets, are "confiscated" or expropriat[ed]," J.A. 21a. When Citibank offered evidence of custom and practice in support of its affirmative defense that WFAL had "assumed the risk" of MAAB-47, it knew full well that the "risk" of this decree fell upon Citibank itself, and that therefore it had to prove an agreement "shifting" this risk from Citibank to WFAL. Petitioner thus set out but failed

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"Your man took it all and he is long gone.' "
–*Have Mercy*, © 1988, Paul Kennerly (BMI)

The dissent in *Garcia* merely argues that the jury did not find an agreement to modify the *Perez* rule. See 735 F.2d at 652-63. That is of no moment here, except to underscore the lack of any agreement between Citibank and WFAL to modify the *Sokoloff* rule, which governs their dispute.

[10] Arbitration clauses, private "statutes of limitations," and exclusions of warranties, found in many contracts, are familiar examples of consensual agreements to vary or displace rules otherwise supplied by law.

to prove that the parties had entered into an "agreed-upon, though unstated condition," based upon custom and practice "in the Eurodollar trade," J.A. 50a, the condition being that Citibank's obligation to repay WFAL was limited to the liquidity of assets "booked" only at Citibank's office at Manila.

When it failed to prove such an express agreement, which would have displaced normal rules and "shifted" sovereign risk from Citibank to WFAL, petitioner then reversed its field. Its trial counsel drew the district court's attention to the *Perez* and *Garcia* cases, saying that the express guarantee given in *Garcia* "wasn't present in *Perez*," and that

> These two cases really . . . illustrate the point that we have been trying to make all along, and that is absent a special agreement by the bank to pay elsewhere, a guarantee that you will be paid elsewhere *regardless of what happened* in the country where the branch is located, the deposit obligation is subject to the law of that country. J.A. 69.

But "what happened" in *Garcia* was Cuban *"seizure of the debt,"* 735 F.2d at 650, and that is not "what happened" in the Philippines. Pet. App. 21a-22a, 37a-38a. The statement of Citibank's trial counsel is simply one more illustration of the illusions upon which its entire presentation is based. Citibank simply refuses to recognize that "sovereign risk" is not an indivisible whole, and that MAAB-47 did not expropriate or "freeze" the debts it owed to respondent. In *Garcia*, plaintiff succeeded in shifting his risk to the bank by an agreement to that end, but Citibank never proved a counterpart agreement shifting its risk to WFAL.

When the court of appeals first requested, and then affirmed, the district court's supplemental finding "that the parties had agreed that repayment was to occur in New York," Pet. App. 7a, it was not asking whether there was an express agreement "shifting" to Citibank a risk that it already bore, for that would make no sense at all. For this reason, petitioner places altogether too much

emphasis on the court of appeals' statement about a "traditional limitation . . . that a debt on a deposit normally authorizes a demand for the money only at the relevant branch." Pet. App. 6a. As shown in Part I-B, *ante*, this "limitation" is pertinent primarily in attachment cases, examples of which are among the decisions cited at Pet. App. 6a-7a, *e.g.*, *Garcia*. The "traditional limitation" in this context is simply another way of referring to the old fiction that a bank's branch office may "be treated as a separate entity for attachment purposes," *Cronan v. Schilling, supra*, 100 N.Y.S.2d at 476.[11]

Turning to the point that a "debt may be collected wherever it is repayable, unless the parties had agreed otherwise," Pet. App. 7a, the court of appeals needed to make sure that the parties "had agreed that repayment was to occur in New York," *id.*, so that it would not have to deal with any arguments that might be made if the facts were otherwise. And the agreement to repay at New York also jettisoned all of the "risk-shifting" arguments now presented by Citibank, which might have detained the court if there had been no such finding. Pet. App. 8a. Probably, there was no need even to address this subject, because Citibank had already failed to prove a custom and practice converting the agreement into one shifting to its depositor the "risk" of Philippine actions taken only as to petitioner's own assets. But in any event, the agreement to repay at New York was satisfactory for all purposes. When the deposits matured, Citibank's sole obligation was, in the language of its own confirmation slip, to "remit" the sums due to WFAL's "account with Wells Fargo Bank Int'l Corp. N.Y." Pet. App. 3a. As the

[11] Other cases cited by the court of appeals, Pet. App. 6a-7a, deal with "act-of-state" concerns where there is dispute as to whether the *res* involved was within the jurisdiction of the foreign sovereign. These concerns are not implicated here, for the Philippine government did not expropriate WFAL's deposit, Pet. App. 22a-23a, and it did not take action as to any of Citibank's non-Philippine assets. Pet. App. 4a, 23a, 34a-35a.

district court noted, unlike deposits involved in many of the reported cases, the deposit agreements did not

> involve certificates of deposit or similar tangible documents that must be presented at a particular branch in order to secure repayment. On the contrary, Citibank's obligation to remit the funds to Wells Fargo was triggered by the passage of time, and Wells Fargo was not required to make a "demand" or take any action in Manila or anywhere else. Pet. App. 19a, note 6.

In the light of these facts, a finding that the parties agreed that repayment would take place at some location other than New York would not be possible. Citibank's complaint that the entire language of its contracts with WFAL was mere "boilerplate," Pet. Br. 47, is both an effort to paper over its failure to prove an agreement shifting its risk to WFAL, and an effort to dispute the finding that MAAB-47 did not prevent repayment or "take" or "freeze" its debts to WFAL. Upon maturity, the only act required of anyone was that set forth in the documents themselves. As the court of appeals said:

> The repeated references to repayments or remittances at maturity to New York accounts amply support the district court's finding that the parties agreed that repayment would be made in New York. Since MAAB 47 has no effect upon a bank's obligation to perform acts outside the Philippines, we conclude that the district court did not err in upholding WFAL's claim. Pet. App. 7a.

In *Garcia v. Chase Manhattan Bank, supra*, plaintiff proved that the parties had agreed that their contractual relationship would not be governed by a rule of local law assigning to the depositor the risk of sovereign action taken against the deposits. Citibank likewise had the burden of proof on its claim that in the light of custom and practice of the trade, the agreements between itself and WFAL included an "agreed upon, though unstated, condition," Pet. App. 50a, shifting the risk of sovereign action, directed at bank assets, from the bank to the

depositor. Its failure to prove any such agreement explains why Citibank's entire argument now rests upon the proposition that a federal rule "*must displace*" the "state or foreign law rules" that Citibank failed to displace in its own contracts here. Pet. Br. 16.

II.

CONGRESS HAS NOT SET ABOUT TO PREEMPT LOCAL LAW GOVERNING THE RELATIONSHIPS BETWEEN BANKS AND THEIR DEPOSIT CREDITORS

As *Sokoloff* and kindred cases have been on the books for decades, it hardly needs be said that if Congress ever perceived a reason to displace this *corpus juris* with a preemptive federal rule, it could and would have done so. Petitioner's claim to federal preemption thus rests upon the alternative argument that Congress has either impliedly preempted local law governing the relationships between banks and their deposit creditors, Pet. Br. 29, 31, or that Congress has delegated this task to the Federal Reserve Board, and the Board has unambiguously exercised that power in a 1987 interpretation of the Board's Regulation D. Pet. Br. 24, 30.

On the first contention, the net of Citibank's position comes to this: Because Congress has chosen to exempt "deposits payable only outside the . . . United States" from the general schemes of reserve requirements and deposit insurance, 12 U.S.C. §§461(b)(6), 1813(*l*)(5)(A), it surely follows that Congress intended that any and every form of "sovereign risk" shall now be borne by a bank's depositors. Even here, however, petitioner is unable to present a cogent exposition of its views. On the one hand, it states that "prevailing common law principles in New York and elsewhere are *consistent* with the federal rule." Pet. App. 17, but it then reverses its field and advises that these same principles are "fundamentally inconsistent" with federal law and "cannot be relied upon to ensure the necessary protection of the federal interest." *Id.* at 16, 17.

As well, we should think that any argument for federal preemption in a field long committed to local regulation would at least acknowledge principles reiterated so recently as last Term's decisions in *California v. ARC America Corp., supra,* and *Northwest Central Pipeline Corp. v. State Corporation Comm'n,* ___ U.S. ___, 109 S.Ct. 1262, 103 L.Ed.2d 509 (1989). *ARC America* holds that there is a strong "presumption against finding preemption of state law in areas traditionally regulated by the States," 109 S.Ct. at 1665, 104 L.Ed.2d at 94, and the *Sokoloff, Perez,* and *Garcia* decisions are but present-day illustrations of the general principle that even national banks

> are governed in their daily course of business far more by the laws of the States than of the nation. All their contracts are governed and construed by State law. Their acquisition and transfer of property, their right to sue and collect their debts, and their liability to be sued for debts, are all based on State law.[12]

These same views were later expressed for the Court by Chief Justice Stone, *Anderson Nat'l Bank v. Luckett, supra,* 321 U.S. at 248:

> This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions. . . .
>
> As we have seen, a bank account is a chose in action of the depositor against the bank, which the latter is obligated to pay in accordance with the terms of the deposit. It is a part of the mass of property within the state whose transfer and devolution of property is subject to state control.

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[12] *First National Bank of Louisville v. Kentucky, supra,* 76 U.S. (9 Wall.) at 362.

Displacement of local law that informs the parties' contracts here requires a strong showing, stated thus in *Northwest Central Pipeline, supra,* 109 S.Ct. at 1273, 103 L.Ed.2d at 527:

> In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

None of these indicia of Congressional preemption are present, and to find them in 12 U.S.C. §461(b)(6) would be to create preemption by the device of "extravagant interpretation" of Acts of Congress, *Northwest Pipeline, supra,* 109 S.Ct. at 1275, 103 L.Ed.2d at 529.

In 12 U.S.C. §461(b)(6), Congress simply used the words "deposits payable only outside the . . . United States" as a catch-phrase for certain kinds of transactions that, in the ordinary course of things, most likely would not involve assets or debts that would be part of the domestic monetary supply. This phrase simply complements and gives further expression to Congress' decision, in 12 U.S.C. §461(b)(2)(B), to confine the Federal Reserve Board's power to prescribe reserves to those that are necessary "solely for the purpose of implementing monetary policy." And elsewhere in the Act, Congress also recognized that the words used in §461(b)(6) are not an all-purpose expression. Thus, in the immediately preceding section of the Act, §461(b)(5), Congress made certain that the Board did retain the power to require reserves by "foreign branches" when their activities do affect the domestic money supply. Thus, a deposit "payable only

outside the . . . United States" might not, in and of itself, trigger a reserve, but the corresponding assets may well do so. For example, in 12 U.S.C. §461(b)(5)(B), Congress confirmed that the Board shall continue to enjoy the power to prescribe "reserves . . . against" –

> loans to United States residents made by overseas offices of such depositary institution if such depositary institution has one or more offices in the United States.[13]

Petitioner's arguments place the cart before the horse, for they presume that reserve requirements define particular transactions, as well as the contractual rights and obligations of the parties to those transactions. But it is the other way around; whether or not a particular transaction triggers a reserve requirement is determined by examining the transaction itself. As the Federal Reserve Bank of New York explained in its *amicus* memorandum in the district court, it examines transactions to see what "the agreement of the parties provides," and uses "extrinsic aids to interpretation where the parties' agreement is ambiguous."[14] All of this illustrates that neither the place of booking of deposits or assets, nor 12 U.S.C. §461, has any real bearing on the question here: Did Congress, or did it not, intend to displace local law as part of a comprehensive scheme to federalize contractual relationships between banks and their depositors? Congress has done no such thing, but it certainly knows how to do so. This is shown by *Fidelity Federal Savings & Loan*

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[13] Accordingly, if Citibank "booked" WFAL's deposits at Manila and then used these and similar deposits to fund loans to General Motors at Detroit, those assets would be "reservable against" under §461(b)(5)(B), notwithstanding any argument that the deposits were "payable" at Manila under §461(b)(6). *See* 12 C.F.R. §§204.2(h), 204.3(a).

[14] This Memorandum is quoted and discussed at pp. 18-19 of the brief *amicus curiae* of Bank of Montreal, et al.

Ass'n v. De La Cuesta, 458 U.S. 141 (1982), another case involving a claim of preemptive federal regulation of contractual relationships between financial institutions and those with whom they deal. There, the Federal Home Loan Bank Board issued a regulation nullifying *Wellenkamp v. Bank of America*, 21 Cal.3d 943 (1978), a California decision that dramatically altered contractual rights under "due on sale" clauses found in most home loan agreements. The opinion in *Fidelity Savings* notes that "the Board's intent to preempt the *Wellenkamp* doctrine is unambiguous." 458 U.S. at 154. Turning next to Congressional intent and the delegation of power to the Board, the Court said that Section 5(a) of the Act, 12 U.S.C. §1464(a)(1), explicitly authorizes the Board to act upon its own view of the "best practices" to be followed by savings associations:

> The broad language of §5(a) expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans. As one court put it, "[i]t would have been difficult for Congress to give the Bank Board a broader mandate." *Glendale Federal Sav. & Loan Assn. v. Fox*, 459 F.Supp. 903, 910 (CD Cal. 1978). * * * Congress plainly envisioned that federal savings and loans would be governed by what the Board – not any particular State – deemed to be the "best practices." See also *First Federal Sav. & Loan Assn. v. Massachusetts Tax Comm'n*, 437 U.S. 255, 258, n.3 (1978) (observing that the HOLA "protects federal associations from being forced into the state regulatory mold"). Thus, the statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law. *Id.* at 161-62.

But neither the National Bank Act nor the Federal Reserve Act is remotely comparable to 12 U.S.C. §1464. Even the most "extravagant interpretations" of the former Acts cannot convert them into statutes "signaling" an intent by Congress to rewrite contracts between banks

and depositors, under the guise of "displacing" the New York or Philippine law governing the deposit contracts here.

If Congress truly believes that federal programs are threatened by rules of law requiring banks to honor their debts, and truly believes that all forms of sovereign risk must be borne by depositors, it is perfectly free to enact legislation to that end. But at present, 12 U.S.C. §461(b)(6) is not such a statute, and petitioner's argument to the contrary would convert that Act into a "schizoid statute." *Business Electronics Corp. v. Sharp Electronics Corp., supra*, 485, U.S. 717, 108 S.Ct. at 1524, 99 L.Ed.2d at 822. On the one hand, we are told that when Congress acted to exempt offshore deposits from the costs associated with domestic reserves and deposit insurance, it enabled U.S. banks "to compete abroad with foreign financial institutions on more nearly equal terms." Pet. Br. 21. But as a U.S. bank's institutional strength, per *Sokoloff*, is also a potent weapon in its arsenal of competitive responses, we are told that Congress simultaneously wished to deprive banks of that weapon.[15] Someday Congress may wish

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[15] The same may be said in respect of counterpart statutory language pertinent to deposits that are not insured under the FDIC scheme, 12 U.S.C. §1813(*l*)(5)(A). This is not a suit against the FDIC as guarantor of Citibank's obligations, and no one would seriously entertain the notion that Citibank's responsibility for its debts converted uninsured deposits into insured ones. Indeed, when a bank is unable to offer insured deposits, its creditors must look to the institutional strength of the bank itself, and in the international marketplace, the *Sokoloff* rule "reassure[s] foreign depositors that their money will be safer with [U.S. banks] than they would be in a locally incorporated bank." *Vishipco Line v. Chase Manhattan Bank, supra*, 660 F.2d at 863.

As well, Eurodollar deposits typically range in amounts from $1 to $20 million, and FDIC insurance does not cover the

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to make such a curious change in the efficient operation of free markets, but it has not done so yet.

III.

INTERPRETATIONS OF THE FEDERAL RESERVE BOARD LIKEWISE DO NOT SIGNAL EITHER THE POWER OR THE EXERCISE OF POWER TO PREEMPT LOCAL LAW

In truth, petitioner's "displacement" arguments rest not so much upon Acts of Congress as they do upon the Federal Reserve Board's 1987 interpretation of its Regulation D. That interpretation appears at 12 C.F.R. §204.128 (Dec. 16, 1987), and we may begin by noting that in cases of dual regulation, claims that agency action has preempted local law are scrutinized with the utmost care, *e.g., Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 374 (1986), bearing "in mind 'the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by . . . violating its statutory mandate,'" *Office of Consumer's Counsel v. Federal Energy Regulatory Comm'n*, 655 F.2d 1132, 1142 (D.C. Cir. 1980), quoting *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

The powers delegated to the Federal Reserve Board are quite unlike those delegated to the Federal Home Loan Bank Board, particularly as respects the question whether Congress wished to grant national banks a counterpart freedom from "the state regulatory mold." *Fidelity Federal Saving & Loan Ass'n v. De La Cuesta, supra,* 458 U.S. at 161-62. The power to alter locally-created deposit contracts is not among the "enumerated powers" of the Federal Reserve Board codified in 12 U.S.C. §248, and the

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(Continued from previous page)

excess of any deposit exceeding $100,000. Thus, Eurodollar deposits would not enjoy any meaningful insurance protection under any circumstances.

Board's delegated powers as to reserve requirements are confined to those necessary to regulate reserves "solely for purposes of implementing monetary policy." 12 U.S.C. §461(b)(2)(B). To this end, the Board's Regulation D simply paraphrases the Act's words about "deposits payable only outside the United States," 12 C.F.R. §204.2(t), so our comments about the Act apply as well to the Regulation.[16]

Turning to the Board's 1987 "interpretation" of Regulation D, at 12 C.F.R. §204.128, one finds a curious history. The "interpretation" was first published in 1970, but was deleted in 1980. Thus, it was not on the books in June of 1983, when Citibank accepted WFAL's deposits, and indeed did not reappear until December 16, 1987, long after the events in question.[17] Doubtless because of concerns about retroactivity, Citibank's petition was laced with statements that the 1987 interpretation reflects settled "assumptions." Thus, the Court is told that "U.S. Banking policies . . . *presume* that, unless agreed otherwise, depositors bear the sovereign risk," and that this all derives from "Congressional [and] Federal Reserve Board . . . *understanding*." Pet. 11. In the same vein, Citibank said that "it has never been thought" and "federal regulators have never regarded" interbank specification for payment at New York as "indicative that assets not booked" at a particular branch might be used to satisfy debts. *Id.* But as there is no federal law on the

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[16] Simply put, this is not an instance where an agency needs power to displace local laws governing private deposit contracts because such contracts and laws stand "as an obstacle to the accomplishment and execution of congressional objectives," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Congress has not empowered the Board to dictate the form of any contract. The power to require reserves depends upon the nature of the transaction at hand.

[17] See 52 Federal Register 47,693, Dec. 16, 1987: "the text of [this] Regulation D interpretation has not appeared in the Code of Federal Regulations since 1980."

subject, whatever "understandings" there were had to come either from local law decisions, or "custom and practice" among bankers to abrogate those decisions. The latter was not proved at the trial, and the former takes us back to the principles in cases such as *Sokoloff, Perez*, and *Garcia*, discussed in Part I, *ante*.

The clear distinctions made in these decisions shed a good deal of light upon the Board's 1987 interpretation, and show that it has no bearing upon this case. It begins:

> In accepting deposits at branches abroad, some depository institutions may enter into agreements . . . that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment. The question has arisen whether such deposits are subject to Regulation D, and this interpretation is intended as clarification. 12 C.F.R. §204.128(a).

Thus, the Board was not attempting to change or outlaw any form of deposit agreement, and was not attempting to "displace" local *corpus juris* that governs such agreements. It simply recognized that the status of reserves is to be determined from an analysis of each agreement and the rules of local law that apply to particular agreements. Subpart (c) of the interpretation then states that when a "guarantee" spoken of in subpart (a) is present, local law principles may well provide that:

> A customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals.

The Board's "premise" (U.S. Br. 29) is entirely consistent with the precedents. The *Perez* case, involving Cuban seizure of a bank's debt to its depositor, was most assuredly one involving a "restriction on withdrawal," and the words of subpart (a) of the interpretation – "agreements . . . that in effect guarantee payment of such deposits . . . if the foreign branch is precluded from making payment" – capture the essence of the agreement

between the parties in the *Garcia* case, *viz.*; an express contractual understanding abrogating the *Perez* rule, to ensure that

> no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay the depositors. *Garcia, supra*, 735 F.2d at 650.

This idea is captured in subdivision (c) of the 1987 interpretation, stating that:

> when payment of a deposit in a foreign branch is guaranteed . . . the depositor no longer assumes this risk . . .

That is true as far as it goes, but it does not go far enough to assist petitioner here. The *Perez* risk is the risk that the sovereign will take or freeze the bank's debt to the depositor, and that "[h]aving once made payment" to the sovereign, the bank is not liable "to pay . . . a second time." *Perez v. Chase Manhattan Bank, supra*, 61 N.Y.2d at 465. It is this *risk* that the parties shifted to the bank by their deposit contracts in *Garcia*, and it is "*Garcia* guarantees" to which the 1987 interpretation is addressed.

The "*Sokoloff* risk" is something quite different; it involves the risk of loss of bank assets, and the law places that risk of loss on the bank, which is both the owner of the assets and the party having sole discretion as to its lending and investment decisions. Had the author of the 1987 interpretation wished to displace *Sokoloff* and shift that risk to any class of depositors, he or she would have said so in clear and unambiguous language. In *Fidelity Savings & Loan Ass'n v. De La Cuesta, supra*, 458 U.S. at 154, great stress was placed upon the Federal Home Loan Bank Board's "unambiguous . . . intent to preempt the *Wellenkamp* doctrine" of California contract law. To read the 1987 interpretation as petitioner reads it is to create ambiguity, not to cure it.

Still further, in 1980, the New York Clearing House Association, which now appears in this Court *amicus curiae*, and whose members include petitioner Citibank

N.A., wrote to the Federal Reserve Bank of New York to express comments about proposed Board amendments to Regulation D. J.A. 127-131. The Association noted that the proposed Regulation spoke of "a deposit that is payable only at an office located outside the . . . United States," and said that this simplistic wording would be "unworkable," because

> There are circumstances under which a deposit in a foreign branch could be required to be paid in the United States, although there is neither an intention nor expectation on the part of the depositor or the bank that it will be paid in the United States. * * * One example is illustrative. Assume that there has been a major defalcation at a foreign branch of a U.S. bank so that it has insufficient funds to pay its depositors. In such a case, the depositor *could undoubtedly require the home office to make payment.* See *Sokoloff v. National City Bank of New York*, 130 Misc. 66, 224 N.Y.S. 102 (1927), aff'd 223 A.D. 754, 227 N.Y.S. 907 (1928), aff'd 250 N.Y. 69, 164 N.E. 745 (1928). J.A. 129.

So here we have clear recognition, by all concerned, that the words used in both 12 U.S.C. §461(b)(6) and Regulation D did not make any change in the *Sokoloff* rule. Thus, when the Board adopted the 1980 amendments to Regulation D, and deleted its 1970 interpretation, it understood that the words "payable only outside the . . . United States" were never intended to preempt local law that, in the Association's words, "would undoubtedly require the home office to make payment" under the *Sokoloff* rule. J.A. 129. Had the Board perceived a need to displace this rule, it would have done so, and this also demonstrates that the 1987 Board interpretation is addressed to "*Garcia* guarantees" and nothing more.

Moreover, the 1987 interpretation concludes with this statement:

> This interpretation is not designed in any respect to prevent the head office from . . . making advances . . . to its foreign branches . . . [12 C.F.R. §204.128(d)].

As Citibank's trial counsel acknowledged, Citibank could have transferred funds to its Manila branch to permit repayment of WFAL's debt at that location, but he argued that this would be unnecessarily "circuitous," and that Citibank should just "pay them direct" at New York. J.A. 65. As there is no principled reason to insist that Citibank repay "circuitously" at Manila, rather than "direct" at New York, it is plain that no federal interest is sabotaged by a judgment requiring Citibank to do no more than that which it contracted to do in the first place – pay at New York.

By their terms, 12 U.S.C. §461 and Regulation D address reserve requirements keyed to implementing domestic monetary policies. Offshore deposits are ordinarily exempted from reserve requirements upon the assumption that most such arrangements will not have a direct and immediate effect upon the domestic money supply. But this is no more than a generalized assumption that Congress knew would not be appropriate in every case. This is shown by exceptions to the generalized assumption, found in 12 U.S.C. §461(b)(5)(B), which provides that when funds raised by offshore deposits (including deposits "payable only outside . . . the United States") are channeled into domestic investments, reserves are required in whatever amount the Board specifies.

Thus, Congress has not sought to dictate the form of any particular transaction, or to preempt local law governing the rights of the parties in those transactions. It has simply said that the Board may require reserves when the circumstances of a particular transaction appear to call for such action. The 1987 interpretation simply seeks to explain why, in transactions involving "guarantees" of the kind given in the *Garcia* case, the Board believed that reserves were required.

If the Board truly believes that it is necessary to "displace" local law requiring banks to honor deposit contracts under circumstances where the deposits are neither "taken" nor "frozen" by decrees of foreign governments, it will address that subject in an explicit, unambiguous regulation, if it has the power to do so, or it will seek from Congress the same kind of unlimited power over private contracts as is enjoyed now by the Federal Home Loan Bank Board. *See Fidelity Savings & Loan Ass'n, supra,* 458 U.S. at 161-62. There is no merit at all to petitioner's contention that the Acts, regulations, and interpretations to which it calls attention preempt local law, and shift to depositors all risks of sovereign action.

IV.

THIS COURT SHOULD NOT CREATE FEDERAL COMMON LAW

This Court creates federal common law only in "a few areas, involving 'uniquely federal interests.' " *Boyle v. United Technologies Corp.,* ___ U.S. ___, 108 S.Ct. 2510, 2514, 101 L.Ed.2d 442, 452 (1988), quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 640 (1981). These "few and restricted areas," *Wheeldin v. Wheeler,* 373 U.S. 647, 651 (1963),

> are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called "federal common law." *Boyle, supra,* 108 S.Ct. at 2514, 101 L.Ed.2d at 452-53.

The "guiding principle" remains, as Justice Harlan wrote for the Court in *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966):

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions . . . among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that "Congress acts . . . against the background of the total *corpus juris* of the states . . . " Hart & Wechsler, The Federal Courts and the Federal System 435 (1953).

Banking is not a field of "unique" federal interest. The United States has promoted a dual system of local *and* federal regulation, rather than uniform national rules. This system has primarily left it to local law to define the legal relationships between banks and their depositors. *Ante,* p. 31. Among other things, WFAL invokes in this case the rule of local law that a bank ultimately has *an institutional* obligation to honor all of its unconditional debts, including those reflected by deposits booked at foreign branches. This proposition is but one of the many concepts of state and local law which define the duties of the bank, as a debtor, to fulfill commitments to depositors and other creditors. In most respects, Citibank seems content to be subject to local law even insofar as that law would require Citibank, for example, to use all of its assets to repay deposits booked at a foreign branch rendered illiquid by embezzlement. See Pet. Br. 20, n.26.

The question is whether the Court should carve out an enclave of exclusive federal law amid this sea of local law whenever there is some trace of sovereign action.[18]

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[18] As is true elsewhere in its brief, Citibank continues to mischaracterize MAAB-47. Nothing about the decree prevents

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Several considerations weigh in the analysis. As discussed *ante* pp. 30-42, neither Congress nor bank regulators have imposed preemptive federal law. This is not indicative of a lawmaking void or oversight, but of the traditional vitality of local law in the field of banking and, especially, in matters of bank and depositor relations. *Anderson National Bank v. Luckett, supra.* Further, the United States proposes *no* change in the application of existing local law. Against this backdrop, only a compelling showing would support creation of federal common law.

Citibank does not invoke banking as one of the "uniquely federal" interests that it identifies. Instead, it selects "foreign commerce and foreign relations." Pet. Br. 36. However, the principle that a bank commits as an institution to honor its debts poses no threat to the foreign commerce or foreign relations interests of the United States. This rule does not conflict with these (or any other) federal policies. Yet this is the rule which Citibank seeks to depose. A displacement will only upset the legitimate expectations of the marketplace and of Citibank's many depositors. *See* J.A., 530, 532; Pet. App. 17a (comments of the trial judge). It is hardly conducive to the nation's interest in promoting commerce and fostering cordial foreign relations that its Courts upset the expectations of an international marketplace at the behest of one participant whose lack of candor in the market precipitated the present controversy.[19]

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repayment. The decree temporarily restricts liquidation of certain Citibank assets. *See ante*, pp. 6-7. Thus the sovereign action which Citibank envisions as sufficient to supplant state and local law need not even be directed at depositors or at deposits.

[19] Use of federal common law to insure tranquil relations with foreign nations has been recognized, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). But in *Sabbatino*, federal

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In any event, Citibank fails to persuade that reallocation to depositors of *all* of the risk of *any* sovereign action will advance the ill-defined federal interests in foreign commerce and foreign relations invoked as grounds for federal common law. Pet. Br. 37. This case concerns sovereign action directed at a few of the *assets* of Citibank. Citibank nowhere shows how in such a case unique federal interests would be advanced by shifting the risk of sovereign action against assets away from the owners of the assets, namely the banks, each of which enjoy plenary control over the placement of their assets throughout the world.

Having identified foreign commerce and foreign relations interests as the predicate for federal common law, Citibank immediately lapses into a discussion about the banking system and banking interests. Pet. Br. 37. As soon as the debate returns to that realm, the uniquely federal interests necessary for federal common law give way to the traditional role that state and local law play in banking transactions. In any event, there is no demonstrated or manifest connection between Citibank's proposed rule and the banking interests it embraces.

1. Citibank warns that its rule is needed to protect the U.S. banking system from sovereign acts, and needed in order to proliferate foreign branching. Pet. Br. 37. Of course, more branching increases the influence of foreign sovereigns. Further, prudent branching and lending are as important as the amount of each undertaking. Exonerating banks from the geopolitical consequences of their branching and lending activities only eliminates the importance of accountability as a behavior-regulating device.

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common law was enlisted to assure proper respect to foreign sovereign action *itself*. Such a rule implicates perforce "*our* relations with foreign nations . . . " *Texas Industries, supra*, 451 U.S. at 641. This case presents no similar imperative connection to the diplomatic interests of the United States.

2. Citibank showcases reserve requirements and deposit insurance. Pet. Br. 37. But reserve requirements do not protect the banking system, for they are purely tools of monetary policy. As for insurance, Eurodollar deposits typically range in amounts so vastly in excess of the $100,000 FDIC "ceiling" as to be beyond any practical concern. *Ante*, pp. 35-36 and n.15.

3. While Citibank claims its rule will foster the Eurodollar market, Pet. Br. 37, WFAL posits otherwise. The trial demonstrated that the Eurodollar market does not share Citibank's views on sovereign risk. That market assigns these risks by use of existing law and, as the trial judge saw it, there is ample room in the market mechanism for Citibank to adjust contract terms to change the allocation of sovereign risk. *Post*, p. 49. It is difficult to see how the market would be enhanced by unnecessary judicial intrusion into its operation.

Nor is there convincing force in Citibank's extreme assertion the federal common law is necessary, and transactions must be judicially restructured, in order that federal regulators may more conveniently identify the places where deposits are payable. Pet. Br. 37-38. Such determinations have been made heretofore to the apparent satisfaction of regulators, who have not promulgated mandatory federal law. Nor does Citibank even attempt to reconcile this argument with its concession that state and local law properly cause it to be liable "in New York" for a deposit booked or payable at a foreign branch that is unable to repay for reasons unrelated to sovereign action.[20]

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[20] As for the invocation of 12 U.S.C. §632, Pet. Br. 39, every legal issue in a case which "arises under federal law" is not by force of the "arising under" grant of jurisdiction governed by federal law. *Compare Texas Industries, supra*, 451 U.S. at 640-41; Pet. Br. 39. Certainly the jurisdictional grant in Section 632 has not been so construed. *See Corporation Venezolana de Fomento v. Vintero Sales*, 629 F.2d 786 (2d Cir. 1980).

At bottom, this is a purely private contract dispute. Such cases are not appropriate ones for application of federal common law. *Bank of America, N.T. & S.A. v. Parnell*, 352 U.S. 29, 33, 34 (1956). Most federal common law, especially as respects banking, has been crafted in cases in which the United States is directly interested in the litigation in which the law is announced. *See, e.g. United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

Boyle v. United Technologies Co., is entirely consistent with this trend of decision. While the litigants in *Boyle* were private persons, their dispute "directly affect[ed] the terms of Government contracts" for military procurement. 108 S.Ct. at 2515, 101 L.Ed.2d at 454. The "uniquely federal" interests which underlay *Boyle* were (1) the "obligations to and rights of the United States under its contracts," and (2) "the civil liability of federal officers." 108 S.Ct. at 2514, 101 L.Ed.2d at 453. The decision in *Boyle* protected the integrity of the procurement contract entered into by the United States.

This case is far afield from the traditional circumstances in which the Court has created federal common law. Usually existing federal law powerfully informs the need for and content of the proposed federal common law. Here, the interests and policies which Citibank invokes are at a fairly high level of abstraction and speculation, particularly when viewed in the light of the record in this case.

In this kind of case, Congress is far better equipped to debate the relative merits of the points that Citibank raises. These policy debates must also account for countervailing considerations: the consequences of upsetting existing contracts and departing from existing market practices; the utility of fastening Citibank's new rule of

U.S. law onto a multi-nation market; and the fairness to depositors of any new rule. Finally, if there is a decision to create federal law, the proper content of that law must be evaluated. In particular, the law creator must define the type of "sovereign action" sufficient to suspend the bank's duty to honor deposits. Many acts of every government invariably influence those within the sovereign's territory, including branch banks. But surely not every type of sovereign action makes it appropriate to sacrifice traditional depositor rights in favor of robust commerce and healthy international relations. An appropriate delimiting line must be drawn.

This Court is ill-equipped to make these policy judgments. The international implications should be settled by the Executive Branch. *See Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The weighing of domestic and regulatory considerations falls within Congress' special province. As explained in *United States v. Gilman*, 347 U.S. 507, 511-13 (1954):

> The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriate for those who write the laws, rather than for those who interpret them.

In matters such as this, this Court properly defers to the superior lawmaking abilities of other branches. *Bush v. Lucas*, 462 U.S. 367, 390 (1983). So it should here, for reasons of institutional competence.

It is singularly appropriate to leave these matters to legislative action for another reason. No governmental action is immediately needed or, in fact, needed at all. Citibank ultimately seeks federal law that permits it to define its duties to depositors *by contract*. Pet., p. 9. Yet this is exactly what happens under existing law. There is no reason to relabel traditional contract law as "federal" if the objective of this case is to do other than reform (at

WFAL's expense) two of Citibank's prior deposit contracts. The contract need only be changed henceforth and this is quite possible without any change in law. As the trial judge in this case observed at the close of the trial, J.A. 38:

> Although it is not for me to practice law and tell you how to do things, it seems to me that it would be a dead cinch, you are dealing with a very small number of people, small number of banks, small number of brokers, and it seems to me that it would be a dead cinch for Citibank to publish their views in such a way that no one in that small community could realistically say he wasn't aware of it when making a deposit.

It seems a curious use of this Court's carefully restrained "common law" jurisprudence to rescue Citibank's ambiguous method of doing business when Citibank is perfectly free to achieve the results it seeks by application of the law already in force. Nor is the existence or outcome of this litigation any reason to eschew this approach. By electing to do business through branches, rather than through locally incorporated banks, Citibank coveys to depositors the idea that they are doing business with a large, well-known bank of great stature and dependability. In this case, Citibank preferred not to clarify its own views of its liability by disclosure. J.A. 37, per Judge Knapp. It was to be expected that a method of doing business which confused customers about the extent of Citibank's commitment to repay would cause litigation and expose Citibank to the risk that its privately held views might not be accepted as deposit contract terms. Citibank attempted unsuccessfully to prove its version of the contract. It is a familiar principle of the law that the adverse consequences of ambiguity always fall on the persons responsible for the existence of the ambiguity.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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No. 88-1260

IN THE
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CITIBANK, N.A.,
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v.
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER CITIBANK, N.A.

The court of appeals erroneously concluded that in this case petitioner Citibank, N.A. ("Citibank") had agreed to take over from its Philippine depositor the risk that the Philippine government would restrict withdrawal of deposits made in the Philippines. The court's ruling rested entirely on the fact that the foreign branch and the depositor, WFAL/Singapore, had used standard Eurodollar instructions, routing the funds by wire transfer through bank accounts in New York. Significantly, neither respondent nor its *amici* defend the court of appeals' reasoning. Indeed, respondent expressly concedes (Resp. Br. at 20) that "the place for 'payment,' 'collection,' 'clearing,' 'demand,' or otherwise, has no modifying effect upon the extent of the promise made to repay." Given this disavowal of the rationale below, and for the reasons stated both in our opening brief and in the brief of the

United States as *amicus curiae* in support of reversal,[1] it is clear that the decision of the court of appeals cannot stand.

Having abandoned the court of appeals' holding, respondent asserts two alternative grounds in an effort to salvage the judgment below. First, it contends as a factual matter that its Eurodollar deposits were made with Citibank in *New York*, not with Citibank/Manila, and that Citibank therefore was required to use its worldwide assets to repay respondent's deposits. This assertion is simply wrong, as the undisputed facts demonstrate, and has no support in any of the decisions below. Second, respondent argues that under New York law foreign sovereign risk rests on the U.S. home office of the foreign branch rather than on the foreign depositor. This is an incorrect statement of New York law (and is also an incorrect statement of Philippine law).

In any event, if state or foreign law were to that effect, it would be displaced by the paramount rule of federal law that, absent an express agreement to the contrary, a U.S. bank is *not* liable for foreign branch deposits when the foreign government interferes with the branch's repayment. As shown in Citibank's opening brief, Congress delegated to the Federal Reserve Board the power to regulate foreign branches of U.S. banks.

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[1] *See, e.g.*, U.S. Am. Br. at 11 ("[a]lthough the deposit was settled, as is customary in the Eurodollar trade, through interbank transfers between the parties' correspondent New York banks, that method of settlement did not alter the deposits' situs at Citibank/Manila, nor did the clearing instruction constitute an agreement that would have rendered the deposits legally payable in New York"), 18-19 ("[t]he federal bank regulatory agencies . . . are in agreement that the settlement of a Eurodollar transaction through electronic transfers between New York banks does not alter the situs of the deposit or render it legally payable in New York," and "no market participant—including [respondent]—has ever suggested that the routine transfer of funds through correspondent banks can change the situs of a deposit").

In exercising this power, the Board has said that, in the absence of an agreement to the contrary, the depositor in a foreign branch bears the risk that the foreign sovereign might restrict payment by the branch. Congress ratified the Board's action. The undeniable result was federal law that governs this case.

Because of the controlling force of federal law here, it is unnecessary for this Court to become involved in any intricate analysis of New York law, Philippine law, or choice of law; even if New York (or Philippine) law imposed foreign sovereign risk on the U.S. home office, Citibank would prevail as a matter of federal law. Furthermore, as explained in our opening brief (at 32-37), both federal banking policies and litigation efficiency would best be served by disposing of this case on federal law grounds. Nevertheless, since respondent heavily emphasizes its factual and local law theories, we begin with those issues and then return to our fundamental position that federal law places foreign sovereign risk on the depositor rather than the U.S. bank.

I. BECAUSE RESPONDENT'S DEPOSITS WERE MADE WITH CITIBANK/MANILA RATHER THAN CITIBANK, N.A., CITIBANK WAS NOT OBLIGATED TO USE ITS WORLDWIDE ASSETS TO REPAY THE DEPOSITS.

Respondent baldly asserts that it made its Eurodollar deposits "with Citibank, N.A. at New York" (Resp. Br. at 2) and that at "[t]he moment Citibank accepted [respondent's] deposit at New York, Citibank itself became indebted to [respondent], without regard to the branch at which the deposits were 'booked'" (*id.* at 3). As a result, in respondent's view, "Citibank, N.A., unconditionally promised to repay [respondent], at New York, upon maturity of the deposits" (*id.* at 18) and was "obligated" (*id.* at 12) to use all of its worldwide assets—

not just those of its Manila branch—to repay those deposits. Since MAAB 47 applies only to dollars held by Philippine institutions (*see* Citibank Br. at 7), respondent argues that the decree does not affect Citibank's obligations to pay back the deposits from assets that are not held by the Philippine branch.

It has never been disputed, and the record affirmatively demonstrates, that respondent chose to make deposits with Citibank's branch in *Manila* and not with Citibank, N.A., in New York. *See* Pet. App. 3a ("WFAL . . . placed two six-month, nonnegotiable U.S. $1,000,000 deposits with Citibank/Manila").[2] From the outset, the issue in this case has been the legal liability of the U.S. home office for *foreign* branch deposits; the fact that respondent's deposits were placed with Citibank's foreign branch has always been recognized by both parties and is incontestable. Accordingly, respondent's revisionist description of the deposit transaction is simply false.[3]

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[2] Indeed, not only did respondent's money broker in Singapore enter into oral deposit agreements by telephone with Citibank/Manila, but respondent carried on all correspondence with Citibank/Manila and confirmed the interest rate and repayment date through telex messages to Citibank/Manila—not Citibank, N.A. *See* Pet. App. 3a.

[3] This is far from the only respect in which respondent and its *amici* make factual assertions based on their "understandings" that are nowhere in the record and are either misleading or simply wrong. For example, although *amici* contend that "three other international banks . . . each fully repaid the deposits of their Philippine branches" (Bank of Montreal Am. Br. at 10 & n.11), we are informed that two of those banks did not have any interbank placements in the Philippines at the time of the moratorium and the third, Bank of America, has never publicly confirmed what actions it took. Tr. at 953. Similarly, whereas *amici* assert that Citibank/Manila accepted deposits subsequent to MAAB 47, the deposits Citibank/Manila accepted after the moratorium was announced had been contracted for immediately prior to MAAB 47's issuance and

For the same reason, it also is not true that Citibank elected to "denominate[] these deposits as ones 'booked' at its Manila branch office, meaning that after it accepted the funds in New York, Citibank transferred them to its Manila branch." Resp. Br. at 2. Citibank's booking procedures were not voluntarily or arbitrarily selected, but rather reflected the fact that respondent placed its deposits with Citibank's Manila branch. It was respondent as the depositor, not Citibank, that chose to make the deposits in the Philippines; as the government explained in its *amicus* brief in the court of appeals (at 18 (citation omitted)):

> [T]he risk of sovereign action may be better assumed by the depositor, who has willingly deposited funds with that foreign branch rather than in the United States or another country. This is particularly true in the context of an interbank market transaction where, as here, depositors are sophisticated and have the ability to choose between banks located in numerous countries. Presumably, the depositor selected a foreign branch in the first place because of the higher interest rate offered offshore; in this regard, the depositor perceives the lack of federal regulation as a benefit to be sought, rather than a cost to be borne or a risk to be avoided. The depositor is in a superior position to avoid unacceptable sovereign risks (to him) either by going to another bank, banking in another country, or contracting with the bank to guarantee the deposit at the head office.

See also id. at 18-19 n.18. While Citibank remains liable for the credit risks involved in its overseas banking op-

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MAAB 47 did not apply to such deposits. And the full passage from the New York Clearing House letter that respondent selectively quotes (Resp. Br. at 39-40), clearly shows that the Clearing House was referring to credit risk rather than sovereign risk.

erations (*see* Citibank Br. at 16 n.26; *compare* Resp. Br. at 4), it is respondent that bears the risk of interference by the country in which it knowingly made its deposits.

II. NEW YORK LAW DOES NOT IMPOSE FOREIGN SOVEREIGN RISK ON U.S. BANKS OR REQUIRE THEM TO USE THEIR WORLDWIDE ASSETS TO REPAY FOREIGN BRANCH DEPOSITS WHEN THE FOREIGN SOVEREIGN PREVENTS THE BRANCH FROM PAYING.

Selectively picking and choosing among New York cases, respondent contends that New York law imposes foreign sovereign risk on the U.S. bank rather than on the depositor, thereby requiring the bank to use its worldwide assets to repay deposits at its foreign branch whenever the foreign sovereign prevents the branch from paying. Under this theory, Citibank was required to call upon all of its other assets to satisfy respondent's Philippine deposits once MAAB 47 precluded repayment by Philippine institutions such as Citibank/Manila.

Respondent's entire argument rests on *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), and *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982). As we show below (at 11-18), contrary to respondent's assumption, federal law provides the rule of decision in this case. But even if it did not, the common law precedents cited by respondent fail to support its position.

Decisions not mentioned by respondent have not followed *Sokoloff*. Thus, in *Dougherty v. National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (1935), the New York Supreme Court held that the home office of a U.S. bank was not liable for deposits placed with its Russian branches where the Soviet government expropriated the

assets and liabilities of the branches. Similarly, in *Tillman v. National City Bank*, 118 F.2d 631 (2d Cir.), *cert. denied*, 314 U.S. 650 (1941), the Second Circuit reached an identical result, noting that deposits placed in the branches "were not converted into continuing deposits payable in New York." *Id.* at 633. While later, the Second Circuit in *Vishipco* purported to apply New York law and invoked *Sokoloff* to support its holding a U.S. bank liable for foreign branch deposits, the New York Court of Appeals subsequently corrected this ruling of New York law and limited it to situations in which a U.S. bank had closed its foreign branch before the foreign sovereign had acted.[4]

In an effort to reconcile some of the precedents under New York law, respondent appears to concede (Resp. Br. at 20-22) that the rule against home office liability is applicable in *some* cases of foreign sovereign interference. But respondent insists that the rule *is* strictly limited to cases in which the sovereign announces that it is seizing or otherwise acting on the depositor's account and does not apply when the foreign sovereign instead announces that it is acting on the branch and restricting the branch's use of its assets.

Respondent's view is both misplaced and mistaken. It is misplaced because—contrary to what respondent would wish—MAAB 47 *did* affect depositors' accounts. As explained by the Senior Deputy Governor and General Counsel of the Philippine Central Bank, the Philippine government order "temporarily suspended" the depositors' right to obtain repayment "of foreign currency obligations [from] foreign banks and financial institutions, except to the extent the Central Bank authorized repayment." J.A. 221. *See also* U.S. Am. Br. at 24. Thus, even if the distinction between foreign sovereign interference

[4] *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984).

with a bank's assets and interference with depositors' accounts were found in New York case law, Citibank would not be liable here for the deposit obligations of its Manila branch since the Philippine Government had itself modified the terms of the obligation.

But, in any event, the distinction that respondent would divine is not supported in New York law. To the contrary, New York law distinguishes between situations where a foreign branch wrongfully refuses repayment (in which case the U.S. bank is liable) and those in which the refusal to repay is justified.[5] This approach to U.S. bank liability is the only sensible one, because respondent's approach would make major questions of U.S. bank liability turn upon the label that a foreign sovereign chooses to place on the action it takes, rather than on the substance of the action taken.[6]

Respondent also seeks (Resp. Br. at 22-23) to discredit the distinction between foreign branches and their home offices under New York law by asserting that it is outdated and has been superseded by technological advances.

[5] *See* U.S. Am. Br. at 26-27; *United States v. First Nat'l City Bank*, 379 U.S. 378, 405 n.27 (1965) (Harlan, J., dissenting). On two occasions the Second Circuit, in purporting to apply New York law, has raised a questionable distinction between a bank's assets and its deposit obligations; but in each instance the distinction was not central to the case because the Second Circuit believed that the U.S. bank had otherwise acted to establish home office liability expressly by guaranteeing repayment in New York, *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984), or by closing the branch before expropriation, *Vishipco*, 660 F.2d 854.

[6] This is not to say, of course, that every action that a foreign sovereign takes with respect to foreign branch operations of a U.S. bank has the effect of relieving the U.S. bank from responsibility. Foreign governments can and do take a variety of regulatory actions (such as imposing taxes or reserve requirements) that do not rise to the level of restricting withdrawal of deposits from the branch. Whether a sovereign action will rise to this level in a particular case will necessarily depend upon a showing of factual restriction on withdrawal.

However, respondent cites no New York case suggesting in any way that this well-settled principle does not continue to be the law of New York; indeed, the Second Circuit relied upon it in the opinion below (Pet. App. 6a) ("a debt on a deposit normally authorizes a demand for the money only at the relevant branch"). Furthermore, as the United States has explained, the doctrine reflects important banking and foreign policy considerations that are at least as important today as they were 30 years ago (U.S. Am. Br. at 14 (citation omitted)):

> If a deposit is payable only at the place where it is made, then the deposit generally will be subject to the law of the jurisdiction where the deposit is made. In terms of international banking law, the separate entity doctrine thus gives recognition to the fact that any banking operation in a foreign country is necessarily subject to the foreign sovereign's own laws and regulations . . . . If a deposit made in one country could be converted into an obligation payable in another country, however, these laws and regulations could be readily evaded.[7]

Finally, respondent (Resp. Br. at 3) and its *amici* (Bank of Montreal Am. Br. at 9) emphasize that the record fails to show that participants in the Eurodollar market had a uniform understanding of the liability of U.S. banks for foreign sovereign risk. At trial, each party introduced the testimony of banking officials and expert witnesses to prove that its understanding prevailed in the market, but the district court ultimately concluded that neither side had established a controlling custom or practice. Pet. App. 35a-36a. Similarly, the parties introduced conflicting evidence with respect to the similarities

[7] Post-*Sokoloff* cases (*see* Citibank Br. at 33-34) refute respondent's suggestion (Resp. Br. at 23) that foreign branch deposits are treated separately only in cases of attachment. Nor is there any support for the statement by respondent's *amici* (Bank of Montreal Am. Br. at 27 n.57) that such treatment is confined to demand deposits and does not apply to time deposits.

and differences among interest rates paid on Eurodollar deposits around the world. In the course of presenting this evidence, various witnesses for both parties testified about the host of complex factors that go into the setting of interest rates, as well as the difficulties even in determining what interest rates prevail at a given time for a deposit of a given size and maturity.[8] The trial court ultimately found that Citibank had failed to prove a difference in interest rates between the Philippines and certain other foreign countries, but at the same time said that it was clear that, whatever the differences or similarities among foreign interest rates, there was a significant difference between interest rates paid on domestic deposits and those paid in the Eurodollar market. Pet. App. 43a.

In any event, all of this evidence was submitted in an effort to prove that an implied-in-fact term of the deposit agreement between the parties resolved the allocation of sovereign risk, not to establish the existence *vel non* of a rule of law. The governing rule—which is the issue before this Court—must be demonstrated through an analysis of precedents and other authorities and cannot be established by a smattering of testimony about commercial practices.

[8] J.A. 350-51 (perceptions of future interest rates and availability of funds at a given location); Tr. at 452 (maturities, credit risk, sovereign risk, and location of deposit).

III. UNDER THE DOCTRINES OF PREEMPTION AND FEDERAL COMMON LAW, FEDERAL LAW PROVIDES THAT DEPOSITORS IN FOREIGN BRANCHES OF U.S. BANKS ASSUME THE RISK THAT THE FOREIGN SOVEREIGN WILL PREVENT REPAYMENT OF THE DEPOSITS BY THE BRANCH.

For the reasons stated above and in the Solicitor General's *amicus* brief, neither New York law nor Philippine law imposes on a U.S. bank the risk of foreign sovereign interference with the bank's foreign branch. If local law were to impose such a risk on the U.S. bank, however, it would be displaced by a superior rule of federal law, which requires that the depositor rather than the home office assume the foreign sovereign risk.[9]

Our opening brief (at 3-6, 14-21) and the government's *amicus* brief (at 1-3, 15-17) described in extensive detail the framework of federal statutes and regulations applicable to the international operations of U.S. banks. From the very beginning of the Federal Reserve Act, Congress and the Federal Reserve Board—acting with respect to reserve requirements, deposit insurance, and other regulatory provisions—have encouraged the establishment and competitiveness of foreign branches of U.S. banks in order to further the foreign commerce of the United States. At the same time, Congress and the Board have insulated U.S. banks from the adverse effects of foreign sovereign actions in order to protect the safety and soundness of the domestic banking system. To accomplish these dual

[9] Contrary to respondent's characterization (Resp. Br. at 14, 38), federal law would not displace all state or foreign law or govern the entire deposit relationship between the branch and the depositor. Instead, federal law provides only a specific and narrowly-focused rule governing foreign sovereign risk that is necessary to further clearly established federal policies and interests. *See* Citibank Br. at 32.

objectives, federal law has established different regulatory schemes for foreign and domestic deposits.

The fundamental premise of these different regulatory structures is the principle that (absent an express agreement) the foreign depositor rather than the U.S. bank is liable for foreign sovereign risk. Under that principle, deposits in foreign branches of U.S. banks are payable solely abroad and therefore are not subject to various federal requirements for domestic deposits such as reserve provisions, federal deposit insurance assessments, and (when they were in place) interest rate ceilings. This central precept was recognized by the Board as early as 1918; it has been consistently followed since that time and was expressly reaffirmed in a 1970 Board ruling[10]; and it has been incorporated by Congress in several provisions of the federal banking laws, including a 1980 amendment that explicitly codified the Board's position. *See* Citibank Br. at 20. Respondent disregards this regulatory structure in its attempt to obtain "something it did not bargain for and had no right to receive—dollar-denominated deposits that are *exempt* from federal reserve requirements and insurance assessments but *legally payable in the United States*." U.S. Am. Br. at 20.[11]

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[10] "A customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." 12 C.F.R. § 204.128(c) (1989).

[11] Going outside the record, respondent's *amici* (Bank of Montreal Am. Br. at 13-14) discuss the operations of International Banking Facilities. Congress created these IBFs in 1980 for particular policy reasons, particularly the desire to enable U.S. banks without foreign branches to participate in the Eurodollar market and to promote New York as an international banking center. It is for these reasons that IBFs are exempt from the usual domestic regulatory requirements—not because Congress was abandoning its long-standing distinction between domestic and foreign deposits. Indeed, the fact that special authorization was required for IBFs supports our position that federal law sharply distinguishes between foreign and domestic deposits unless Congress has adopted a special provision to the contrary.

These federal statutes and regulations plainly establish a rule of federal law providing that the depositor at the foreign branch rather than the U.S. home office bears the foreign sovereign risk. The Solicitor General agrees that the federal regulatory system is "based on the understanding" that the depositor assumes this risk and that a contrary allocation of risk under local law would "create considerable tension with federal banking law and policy" and would "frustrate important federal policies relating to the encouragement of this nation's foreign commerce and the protection of the safety and soundness of the United States banking system." U.S. Am. Br. at 12-13. Accordingly, whether viewed as an issue of preemption or of federal common law, the federal rule must govern and displace any inconsistent state or foreign law. *See* Citibank Br. at 21-32.

Respondent's objections to our argument are insubstantial. Contrary to respondent's assertion (Resp. Br. at 16, 31), international banking has traditionally been regulated by the federal government rather than the states and thus there is no presumption against federal preemption.[12] Likewise, while respondent urges that the Board's regulations lack preemptive effect (Resp. Br. at 16, 36-37), it ignores the fact that federal regulations no less than statutes can preempt state law that stands as an

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[12] The cases upon which respondent relies are inapposite on their own terms. In *California v. ARC America Corp.*, 109 S. Ct. 1661 (1989), there was no conflict between state and federal law; instead, state law simply provided a more liberal remedy than federal law for anticompetitive conduct that violated both state and federal law. In *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 109 S. Ct. 1262, 1274 (1989), Congress had expressly provided that the statute did not preempt the state regulation at issue.

obstacle to federal policies[13] and conspicuously does not challenge the validity of the Board's regulatory provisions under its broad delegation of authority from Congress. *See, e.g.*, 12 U.S.C. §§ 601, 604a, 611a (1988). More important, the administrative position has been ratified by Congress and embodied in the Act itself.

Respondent also contends (Resp. Br. at 16, 43) that international banking is not an area of uniquely federal interest that would support a federal common law rule. But the legal consequences of foreign sovereign actions plainly are a matter of national rather than local concern, and the regulation of foreign branches of U.S. banks long has been the sole province of federal authorities. The foreign commerce and foreign affairs implications of these disputes clearly justify a rule of federal common law, as is illustrated by *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). *See also* Citibank Br. at 23 n.40, 24. Furthermore, the fact that these important federal issues arise in litigation between private parties is no barrier to the recognition of federal common law, as shown by *Sabbatino*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972), and *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988).[14]

While not generally disputing our (and the government's) description of the federal regulatory system and policies, respondent does contest the interpretation of the Board's 1970 ruling. Contrary to respondent's assertion

[13] *See, e.g., City of New York v. FCC*, 486 U.S. 57, 63 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).

[14] *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), upon which respondent relies (Resp. Br. at 42-43), is not to the contrary. In that case, which involved litigation over oil and gas leases in Louisiana, the Court recognized that federal common law would be appropriate where there is "a significant conflict between some federal policy or interest and the use of state law in the premises," but it found "no significant threat to any identifiable policy or interest." 384 U.S. at 68.

(Resp. Br. at 38), however, that ruling cannot reasonably be read to leave the allocation of foreign sovereign risk to foreign or state law; by its terms, the ruling prescribes a uniform federal standard, and it does so in order to promote the federal policies behind foreign branches while protecting the security of the domestic banking system. *See* 12 C.F.R. § 204.128(c) (1989); *see also* U.S. Am. Br. at 12. Nor is there a word in the ruling to support respondent's suggestion (Resp. Br. at 38-39) that it is limited to foreign expropriations; on the contrary, the Board's ruling uses broad and unrestricted language (the foreign depositor bears "whatever risk may exist that the foreign government . . . might impose restrictions on withdrawals"), and respondent has offered no reason why expropriations should be singled out for fundamentally different federal treatment than other forms of foreign sovereign action.[15]

Respondent also makes much (Resp. Br. at 36-37) of the fact that reserve requirements originally were designed to ensure liquidity of U.S. banks but now primarily serve to implement monetary policy. Whatever the purpose, however, the Board's regulations have consistently been understood and applied to treat foreign branch deposits as

[15] The fact that the Board's ruling was omitted, without elaboration, from publication in the Code of Federal Regulations between 1980 and 1987 (Resp. Br. at 37) does not negate its applicability here. The ruling was never repealed, as its subsequent republication makes clear, and in fact it was continuously published in the Federal Reserve Regulatory Service (a Federal Reserve Board publication generally used by bankers instead of the C.F.R.) during those years. Its principle was also reiterated in Staff Opinions of the Federal Reserve Board in 1982 and 1983. *See* Citibank Br. at 19-20 n.32. Moreover, by 1980 Congress had ratified the Board's position and incorporated it directly in the statute. Especially because the 1980 revision of the Board's regulations was not intended as a substantive change (*see* 45 Fed. Reg. 38,389 (1980) ("clarification of language")), the unexplained decision not to continue the C.F.R. publication of the Board's ruling for a few years hardly undermines the ruling's significance.

payable solely outside the United States. Furthermore, the continued exemption of foreign branch deposits from federal reserve requirements from 1918 to the present belies respondent's contention that the change in the purpose of reserves undermines the force of the Board's regulations; indeed, as the New York Federal Reserve Bank explained in its *amicus* brief in the district court in this case (at 6-10), one of the reasons for the Board's 1970 ruling was to "revise[] the published rationale" for the Board's position "[i]n view of the changing role of reserve[s]."

Finally, respondent asserts its own policy reasons for imposing foreign sovereign risk on the U.S. bank rather than on the foreign depositor. These assertions are both inappropriate and incorrect.

As previously shown, federal law—as established in statutes enacted by Congress and regulations adopted by the Federal Reserve Board—provides that depositors generally bear the risk of foreign sovereign interference with the branch's repayment of their accounts. Although, as we have explained, that rule furthers important federal policies, the more fundamental point here is that Congress and the Board have spoken. Respondent purports to advocate judicial deference to the political branches of government, but in fact its argument is exactly the opposite and would require the Court to second guess the policy choices of Congress and the Board.

Nor can respondent's arguments be squared with the purposes of the bank regulatory system or the operation of the Eurodollar market. First, respondent contends (Resp. Br. at 20 n.7, 35) that our position would make U.S. banks less competitive abroad because they would lose the advantage of home office backing for foreign branch deposits. Nothing in federal law, however, precludes a U.S. bank from voluntarily guaranteeing its foreign branches' deposits if it wishes to do so for competitive reasons; on the contrary, federal law specifically recognizes that banks may expressly agree to provide such security. (If they do so, of course, they would have to abide by the federal law restrictions and requirements that apply to deposits that are not payable only abroad.) Thus, it is respondent's position that threatens the competitiveness of foreign branches of U.S. banks, by requiring such banks to assume foreign sovereign risk even if (as will normally be the case) it impairs their ability to offer the same interest rates as are otherwise available in foreign markets. What is more, the adverse competitive consequences of respondent's position are exacerbated by the fact that there are other important legal systems which do not impose home office liability on their banks that compete with U.S. banks in the Eurodollar market. *See* U.S. Am. Br. at 15 n.11; Citibank Br. at 25 n.45.

Second, respondent erroneously suggests (Resp. Br. at 46) that whether or not there is a federal rule imposing foreign sovereign risk on the depositor will not substantially affect the Eurodollar market because there are a number of important participants who fall outside of U.S. jurisdiction. It is difficult to take this assertion seriously, given the importance of U.S. banks in the Eurodollar market. *See* U.S. Am. Br. at 16-17. Nor is it plausible to believe that imputation of home office liability is without effect. Quite apart from Citibank's contention that it would fundamentally change the premise on which participants in the market have been acting, it is undeniable that such a rule would raise substantial questions concerning the application of U.S. reserve, insurance, and other regulatory provisions to Eurodollar deposits. It is precisely these regulatory provisions that have made the Eurodollar market different from the domestic U.S. dollar deposit market.

Lastly, respondent contends (Resp. Br. at 46, 48-49) that the issue of sovereign risk should be resolved by the parties in their deposit contract. But the only issue here is

what the legal rule should be in the absence of such an agreement; the parties remain free to reallocate the risk if they wish. Moreover, as discussed in our certiorari petition (at 18-19) and in the Solicitor General's *amicus* brief at the petition stage (at 17), it is unrealistic and unworkable in international banking markets—and especially in the nondocumentary Eurodollar market—to assume that rules of liability can be set through private negotiation and agreement. It is the underpinning of clear and stable rules that allows private transactions to proceed. *See also* New York Clearing House Am. Br. at 21-23.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

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OCTOBER TERM, 1989

CITIBANK, N.A., PETITIONER

v.

WELLS FARGO ASIA LIMITED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, contrary to the design of federal banking regulation, a United States bank may be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

2. Whether, contrary to federal banking law and policy, the use of standard instructions to route funds through New York bank accounts of foreign depositors constitutes an agreement by United States banks to be liable for deposits in their foreign branches when the deposits are taken or frozen by foreign governments.

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INTEREST OF THE UNITED STATES

The United States has a strong interest in questions of international banking law. The federal government supervises and pervasively regulates United States banks to secure their safe and sound operation and to implement monetary policy. The government also acts as insurer and as a lender of last resort for these institutions. Congress has entrusted the federal banking agencies with special responsibility for the foreign operations of United States banks, which may have a direct effect on foreign relations and commerce. The United States participated as amicus curiae in the court of appeals and previously submitted an amicus curiae brief in this case, at the Court's invitation, urging the Court to grant the petition for a writ of certiorari.

STATEMENT

Petitioner Citibank, N.A. (Citibank) seeks reversal of a court of appeals' decision holding that Citibank's New York office is obligated to repay two dollar-denominated deposits that respondent Wells Fargo Asia, Ltd. (WFAL) placed with a Citibank branch located in Manila, Republic of the Philippines. The court of appeals concluded that Citibank had agreed to repay the deposits in New York and accordingly rejected Citibank's defense that a Philippine government decree, prohibiting remittance of dollars for repayment of principal on obligations owed to foreign banks, suspended the obligation to repay. See Pet. App. 1a-8a.

A. Federal Regulation of Foreign Branch Banking

Congress has authorized federally chartered national banks, such as Citibank, to establish foreign branches "for the furtherance of the foreign commerce of the United States, and to act if required to do so as the fiscal agents of the United States." See Federal Reserve Act, 12 U.S.C. 601 *et seq.*; 12 C.F.R. Pt. 211. A national bank wishing to establish a foreign branch must seek

permission from the Board of Governors of the Federal Reserve System (Federal Reserve Board) to operate the branch "upon such conditions and under such regulations as may be prescribed by the said board" (12 U.S.C. 601). See 12 C.F.R. 211.3(a).[1] A foreign branch of a United States bank is also subject, of course, to local laws and regulations that may impose additional restrictions on its operations.[2]

Foreign branches attract funds for lending through various means. They typically compete with local banks for business and individual deposits, accepting savings, time, or demand deposits in local currency, allowing withdrawals, and paying interest in accordance with the terms of deposit agreements. Foreign branches may also accept dollar-denominated deposits, which are commonly known as "Eurodollars." In the case of Eurodollar transactions, the foreign branch may use dollar-denominated deposits to pay off its dollar-denominated obligations, or it may convert dollar-denominated deposits into local currency through the foreign government's central bank, lend the converted funds locally, and then repay the depositor by reconverting local currency into dollars.[3]

[1] The Federal Reserve Board also approves the establishment of foreign branches of state-chartered banks that are members of the Federal Reserve System (12 U.S.C. 321). In addition, the Federal Deposit Insurance Act requires state-chartered banks that are not members of the Federal Reserve System to seek approval from the Federal Deposit Insurance Corporation (FDIC) before establishing foreign branches (12 U.S.C. 1828(d)(2)).

[2] The major industrial nations have formulated general guidelines describing the regulatory responsibilities of the home country and the host country. See Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983). See also *Citibank, N.A.* v. *Trinh*, No. 88-1031 Pet. App. 68a-73a (excerpts).

[3] Foreign branches generally solicit Eurodollar deposits from financial institutions located throughout the world that seek short-term investment of idle dollar-denominated funds. Financial institutions may participate directly in the worldwide "Eurodollar market" or they may employ international money brokers to place their funds.

A United States bank normally is responsible for the ultimate solvency of its foreign branches, which are "office[s]" of the bank (12 C.F.R. 211.2(h)). See 3 Fed. Res. Bull. 198 (1917); see also Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983). Nevertheless, federal law requires that a United States bank "shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office" (12 U.S.C. 604).

The federal government has drawn other important distinctions between a United States bank's foreign and domestic deposits. For example, Congress has dictated that federally imposed reserve requirements on deposits "shall not apply to deposits payable only outside the States of the United States and the District of Columbia" (12 U.S.C. 461(b)(6)). This exemption, which was codified in 1980, reflects a Federal Reserve Board practice dating back to 1918. See H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979); 125 Cong. Rec. 19,671 (1979); 12 C.F.R. 204.1(c)(5) and 204.128; 35 Fed. Reg. 2768 (1970); 4 Fed. Res. Bull. 1123 (1918). Similarly, for more than 50 years, Congress has exempted from FDIC insurance assessments and coverage those deposits "payable only at an office * * * located outside of the States of the United States." 12 U.S.C. 1813(*l*)(5)(A). And when Congress or the Federal Reserve Board has imposed interest rate, payment, or advertising limitations on deposits, it consistently has provided that such limitations do not apply to deposits payable only abroad. See 12 U.S.C. 371a, 371b; 12 C.F.R. 217.1(c)(2); 21 Fed. Res. Bull. 862, 863 (1935).[4]

B. The Present Dispute

Citibank currently operates a branch office in Manila, the Republic of the Philippines (Citibank/Manila). Al-

[4] The Federal Reserve Board informs us that, as of December 31, 1988, 171 federally chartered banks maintained more than 878 foreign branches and that, as of December 31, 1987, the deposits booked at those foreign branches amounted to more than $240 billion.

though Citibank/Manila obtains funding from Philippine depositors, it has also obtained a portion of the funds needed for lending through Eurodollar deposits. Thus, in June 1983, a Singapore money broker acting on behalf of WFAL, a Singapore bank owned by Wells Fargo Bank, N.A., placed two Eurodollar deposits with Citibank/Manila. The broker telephoned Citibank/Manila and reached an oral agreement as to the amount of the deposits ($1 million each), the interest rate (10%), and the maturity date (December 1983). In accordance with the customs of the Eurodollar market, the parties exchanged brief computer-generated telex messages confirming those terms. The telexes also provided routing instructions for accomplishing transfer of the funds. As in the case of most Eurodollar transactions, the transfer was to be settled or "cleared" through the parties' correspondent New York City banks. Pet. App. 2a-3a, 15a-16a, 41a-42a, 46a-47a.

The deposits proceeded routinely. WFAL, which maintained a correspondent account at the New York City office of Wells Fargo Bank, N.A., instructed that office to transfer $2 million from the WFAL account to Citibank/Manila's correspondent account at the New York City office of Citibank. The correspondent banks then effected the transfer through the use of the New York Clearing House Association's Interbank Payments System (CHIPS), an automated clearing mechanism that, among other things, permits member banks and other participants to credit and debit interbank dollar payments electronically and provides virtually instantaneous transfers of funds. See Pet. App. 16a, 20a, 45a; N.Y. Clearinghouse Ass'n and Inst. of Int'l Bankers Amici Br. at 1-2, 7, 11.[5]

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[5] Once WFAL's funds had been electronically credited to Citibank/Manila's New York account, Citibank/Manila could enter into a "currency swap" agreement with the Philippine Central Bank to exchange the dollars for pesos at a specified rate and to reexchange pesos for dollars at a specified rate and date in the future. To clear that transaction, Citibank/Manila's correspondent bank would transfer the dollars from Citibank/Manila's New York account through CHIPS to the Philippine Central Bank's correspondent New York account. The Philippine Central Bank would then credit pesos to Citibank/Manila's account with the Philippine Central Bank in Manila. Citibank informs us that such a transaction took place in this case.

Prior to the time for repayment, however, the Philippine government issued emergency economic regulations that prevented Citibank/Manila from collecting the necessary dollars—by completing a "currency swap" with the Philippine Central Bank (see note 5, *supra*) or otherwise—in order to repay WFAL's Eurodollar deposits. Specifically, the Philippine Monetary Board issued a Memorandum to Authorized Agent Banks (MAAB 47) requiring that "remittance of foreign exchange for repayment of principal on all foreign obligations due to the foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank * * * for prior approval" (Pet. App. 63a). The Philippine Central Bank interpreted that decree to prohibit Citibank/Manila from repaying WFAL using its Philippine assets, and Citibank/Manila thereafter failed to repay WFAL's deposits at maturity. *Id.* at 3a-4a, 22a-23a, 30a-31a, 42a, 47a-48a.

WFAL commenced this action against Citibank on February 10, 1984, in the United States District Court for the Southern District of New York, to obtain repayment of its Citibank/Manila deposits.[6] Citibank/Manila obtained permission from the Philippine Central Bank to repay the deposits—to the extent Citibank/Manila could—through the use of its non-Philippine dollar-denominated

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[6] WFAL's complaint invoked the court's jurisdiction based on diversity of citizenship (28 U.S.C. 1332) and on a provision of federal banking law providing that "all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, * * * shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits * * *" (12 U.S.C. 632). See Pet. App. 19a.

accounts (such as Citibank/Manila's New York account). As a result, Citibank/Manila was able to repay \$934,000 of the \$2 million owed. In addition, the Philippine Central Bank has permitted Citibank/Manila to reconvert sufficient pesos into dollars to make interest payments on the remaining principal. Wells Fargo seeks return of the unpaid portion of the principal. Pet. App. 4a, 28a-29a, 42a, 48a.

WFAL moved for summary judgment, but the district court denied its motion (Pet. App. 41a-55a), concluding that the case hinged upon the interpretation of the parties' agreement (*id.* at 50a), which in turn depended upon the meaning of their telex communications "as they were used in the Eurodollar trade" (*id.* at 54a). The court then held a trial and ruled that Citibank's home office was required to repay the deposits. *Id.* at 28a-38a. The court accepted WFAL's "invitation to assume that Philippine law governed this action" (*id.* at 30a) and, after reviewing the parties' conflicting affidavits concerning the law of that country, "conclude[d] that under Philippine law Citibank's worldwide assets are available for satisfaction of plaintiff's claim" (*id.* at 35a).[7]

Citibank appealed, arguing that Philippine law, correctly applied, required judgment for Citibank and that the district court's interpretation of Philippine law was contrary to the banking law and policy of the United States. The United States also filed an amicus brief urging reversal. The court of appeals heard argument and remanded the case for clarification. Pet. App. 25a-27a. The court of appeals found it "unclear from the district court's [opinion] whether the court found that the parties agreed that the deposits were collectible only at the

[7] The court determined that its reliance on Philippine law "renders irrelevant most of the questions the parties have disputed before us" (Pet. App. 35a). It nevertheless observed that neither party had established a relevant Eurodollar trade "custom or practice" that resolved the matter (*id.* at 35a-36a). It also "accepted—for the purposes of this lawsuit—the proposition that the deposits were payable only in Manila" (*id.* at 36a), but concluded that its resolution of the dispute rendered that question moot (*ibid.*).

Manila branch" and whether Philippine law "precludes or negates an agreement between the parties to have the deposits collectible outside of Manila" (*id.* at 25a-26a). It therefore requested the district court to address several specific questions relevant to that issue. Pet. App. 26a.

On remand, the district court first addressed whether the parties had reached agreement on the place of repayment of the deposit. The court stated that "it appears to us that repayment and collection describe two distinct concepts" (Pet. App. 14a):

> Repayment refers to the location where wire transfers effectuating repayment at maturity were to occur. Collection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment.

Ibid. The court then ruled, based on the routing instructions contained in Citibank/Manila's and WFAL's telex confirmations, that the parties had "agree[d] that repayment was to occur in New York" (*id.* at 16a). It further concluded, however, that the parties had reached no agreement as to where the debt was collectible, reiterating a previous observation that "neither party succeeded in establishing any universal understanding amounting to custom or practice within the banking community which would imply a collection term into the contract" (*id.* at 17a).

With respect to what law should apply, the district court appeared to disavow its prior conclusion that Philippine law was controlling. Instead, the court reasoned that, given the need for uniform banking rules, the parties' contacts with New York, and the fact that Eurodollar transactions are customarily cleared in New York, New York law should govern the scope of Citibank's undertaking (Pet. App. 18a-24a). Applying New York law, the court then concluded, as it had previously ruled based on Philippine law, that "Citibank is liable for the debt of its Manila branch and plaintiff is entitled to look to Citi-

bank's worldwide assets for satisfaction of its depositors" (*id.* at 24a).

Citibank again appealed, and the United States submitted a letter supporting Citibank's position. The court of appeals nevertheless affirmed the district court's judgment (Pet. App. 1a-8a). The court characterized the dispute as a contract action in which WFAL sought repayment of a debt. The court observed that generally "a creditor may collect or enforce a debt wherever he can obtain jurisdiction over the debtor" (*id.* at 5a), explaining:

> "All debts are payable everywhere, unless there be some special limitation or provision in respect to payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the creditor everywhere."

Id. at 5a-6a (citations omitted). The court further recognized, however, an exception to this general rule:

> A special limitation has traditionally been recognized under general banking principles. Thus, " '[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried. . . .' "

Id. at 6a (citations omitted).

The court explained that, as a consequence of that special banking rule, a debt on a bank deposit "normally authorizes a demand for the money only at the relevant branch" (Pet. App. 6a). "This normal limitation on the situs of a banking debt is, however, subject to variation by agreement of the parties. If the parties agree that repayment of a deposit in a foreign bank or branch may occur at another location, they authorize demand and collection at that other location" (*ibid.*).

The court of appeals stated that "the district court found that the parties had agreed that repayment was to occur in New York" (Pet. App. 7a), and it concluded that this factual determination "plainly is not clearly erroneous" (*ibid.*), reasoning that the telex communications specifying that the funds shall be transferred through the

parties' correspondent New York banks "amply support the district court's finding that the parties agreed that repayment would be made in New York" (*ibid.*). It noted that the district court had treated repayment and collection as divisible concepts, but it concluded that the distinction was immaterial because "a debt may be collected wherever it is repayable" (*id.* at 8a). The court accordingly held that WFAL was "entitled to collect the deposits out of Citibank assets in New York" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

The lower courts in this case advanced three different legal theories in support of the determination that Citibank's New York office is obligated to repay Eurodollar deposits placed with Citibank's branch in Manila. In its initial judgment, the district court held, as a matter of Philippine law, that an obligation incurred by Citibank/Manila was considered an obligation of the bank as a whole. Thus, respondent could look to assets of Citibank's home office in order to satisfy a deposit that had been placed with its Philippine branch. In its second judgment, the district court apparently disavowed any reliance on Philippine law, and held, this time as a matter of New York law, that an obligation incurred by Citibank/Manila was also an obligation of the parent bank (Pet. App. 20a-21a).

The court of appeals did not embrace either of these theories. On the contrary, it acknowledged that under "general banking law principles" a debt on a deposit "normally authorizes a demand for the money only at the relevant branch" (Pet. App. 6a). Nevertheless, the court of appeals concluded that these general principles did not apply here, because the written instructions exchanged by the parties for settlement of the deposit constituted an agreement to make the deposit payable in New York, and thus subject to satisfaction out of the assets of the parent bank.

Citibank asks this Court to reverse the judgment below, and to hold, as a matter of federal law, that a United States bank may not be held liable for foreign sovereign

interference with deposits placed at a foreign branch absent an express agreement to the contrary. Although we find Citibank's proposed rule attractive, we are not convinced that, at least at this juncture in the litigation, it is necessary that such a federal rule be established. The conclusion of the court of appeals that the parties had agreed to make the deposits payable in New York is inconsistent with the district court's factual findings and contrary to both the assumptions underlying the federal regulatory structure and the actual operation of the Eurodollar market. And although the court of appeals did not address either of the theories endorsed by the district court, there is substantial reason to believe that, on remand, the court of appeals would reject those theories as well. Thus, it is quite possible that this case can be resolved in such a way as to avoid any conflict with federal law and policy, and thus to avoid any need to apply federal preemption or federal common law.[8]

1. The court of appeals correctly identified the general banking law principle that, absent an agreement to the contrary, a bank deposit is legally repayable at, and hence is governed by the law of, the place where the deposit is made. The court erred, however, in concluding that Citibank and WFAL had agreed to depart from this established rule. Citibank and WFAL reached an agreement that WFAL's Eurodollar deposits would be settled through electronic transfers between their correspondent

[8] There can be no doubt that this Court may resolve the case on nonfederal grounds. The Court's Rules do not limit the exercise of its power of supervision over judgments rendered by courts of appeals to cases decided on federal grounds. See Rule 10.1(a) (1990). And it is significant that Congress has determined that disputes "arising out of transactions involving international or foreign banking" are sufficiently important and have a sufficient nexus to federal interests to be "deemed" federal questions for purposes of federal court jurisdiction. See 12 U.S.C. 632. As we explained more fully in our brief filed at the jurisdictional stage (at 16-17), we believe that the judgment of the court of appeals in this case may prove to be sufficiently disruptive to the international Eurodollar market to warrant this Court's review and correction whether or not the Court enunciates a federal rule of decision.

New York banks, but that agreement did not alter the understanding that the deposits would be legally payable only at the place of deposit—Citibank's Manila branch. Since WFAL's Eurodollar deposits are payable in the Philippines, they are subject to all applicable provisions of Philippine law, including the Philippine Government's remittance restrictions.

The Eurodollar market exists in large part because the United States banking regulations give special treatment, in the form of exemptions from federal reserve requirements and insurance assessments, to dollar-denominated deposits that are legally payable only outside the United States. Eurodollar deposits command higher interest rates because they are free from costly reserve and insurance requirements that are imposed on non-exempt deposits, but they are strictly subject to the condition that they are legally payable only abroad.

Citibank and WFAL plainly understood that WFAL's funds would be placed with Citibank's Manila branch as Eurodollar deposits. Although the deposit was settled, as is customary in the Eurodollar trade, through interbank transfers between the parties' correspondent New York banks, that method of settlement did not alter the deposits' situs at Citibank/Manila, nor did the clearing instruction constitute an agreement that would have rendered the deposits legally payable in New York.

The court of appeals erroneously concluded that Citibank and WFAL had agreed to make the account payable in New York because it misunderstood the unconventional terminology that the district court used to describe the transactions and it mistook the parties' settlement terms for an agreement to change the situs of the debt. In actual fact, the district court correctly recognized that the parties specified only the place of settlement. They left the place of legal payment to be controlled, as is customarily the case, by the general banking principle that a deposit is payable at the branch where it is deposited—in this case, Citibank/Manila. Indeed, the placements, by every relevant indication, were routine Eurodollar deposits payable only abroad.

2. Because the court of appeals mistakenly concluded that the parties had agreed to make WFAL's deposits payable in New York, it did not reach the district court's theories grounded in Philippine law and New York law. Without expressing any concluded view about those alternative theories, we would note that there is, at the very least, significant doubt about the correctness of the district court's conclusions.

None of the authorities cited by the district court in support of its initial holding that Philippine law would treat WFAL's deposits as a general obligation of Citibank actually stands for that proposition. In fact, after remand, when the district court was confronted with additional authorities questioning this conclusion, it abruptly determined that the dispute should be resolved under New York law. The district court then held, relying on *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), that New York law made deposits placed with Citibank/Manila an obligation of the New York office. But that case arose in the distinct context of funds originally placed with a New York bank for deposit in a foreign branch. In any event, if Citibank/Manila's refusal to repay the deposit was proper under the law of the Philippines, then there would be no basis for recognizing a cause of action under New York law for wrongful refusal to honor a deposit made with a foreign branch.

Any theory grounded in either Philippine or New York law that would make United States banks liable for foreign sovereign interference with deposits placed with foreign branches would also create considerable tension with federal banking law and policy. Federal reserve requirements and deposit insurance obligations are based on the understanding that "[a] customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." 12 C.F.R. 204.128(c). The repudiation of that premise would require a fundamental reassessment of domestic reserve requirements, insurance assessments, and the federal government's exemption for deposits payable only abroad. It would also frustrate important federal policies relating to the encouragement of this nation's foreign commerce and the protection of the safety and soundness of the United States banking system.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE PARTIES HAD AGREED TO MAKE WFAL'S EURODOLLAR DEPOSITS LEGALLY PAYABLE IN NEW YORK

The international banking community employs interbank placements of Eurodollar deposits to promote the efficient accumulation and allocation of capital. Participating banks make those placements in accordance with internationally accepted principles of banking law and in light of the regulatory restrictions that the United States and the host countries have placed on dollar transactions. As the court of appeals recognized, American and English courts have developed a number of general banking law principles governing private transactions that have been adopted around the world as the international banker's "law merchant." The court of appeals accurately identified those controlling principles, but it mistakenly concluded that Citibank and WFAL had agreed to depart from them in this case.

A. The court of appeals correctly stated that "[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried" and that "[t]he consequence of this limitation is that a debt on a deposit normally authorizes a demand for the money only at the relevant branch" (Pet. App. 6a). This rule, which is often referred to as the "separate entity doctrine," was historically justified at least in part because of the perceived "impracticality of requiring constant transmission of reports on the status of accounts in one branch to all other branches." *United States* v. *First Nat'l City Bank*, 321 F.2d 14, 22 (1963), aff'd en banc, 325 F.2d

1020 (2d Cir. 1964), rev'd on other grounds, 379 U.S. 378 (1965). Given modern telecommunications technology, a more enduring justification flows from the choice-of-law implications of the doctrine. If a deposit is payable only at the place where it is made, then the deposit generally will be subject to the law of the jurisdiction where the deposit is made. See Restatement (Second) of Conflict of Laws § 195 (1971). In terms of international banking law, the separate entity doctrine thus gives recognition to the fact that any banking operaation in a foreign country is necessarily subject to the foreign sovereign's own laws and regulations regarding such matters as the timing and amount of withdrawals; rates of interest; convertibility into foreign currency; local capital, reserve and insurance requirements; and the scope of permissible activities. See *United States* v. *First Nat'l City Bank*, 321 F.2d at 14.[9] If a deposit made in one country could be converted into an obligation payable in another country, however, these laws and regulations could be readily evaded.

The separate entity doctrine applies even though the foreign operations of United States banks are conducted through branches rather than subsidiaries. Some countries permit foreign bank operations only in branch form,[10] while in others local rules may make branch operations the only commercially feasible alternative. The separate entity doctrine therefore permits United States banks to operate in these countries, while at the same time assuring that foreign sovereign authority over banking activity within its own territory is fully respected. Indeed, any other rule would require a substantial restructuring of the international operations of United States banks, and could put those banks at a competitive disadvantage relative to their foreign counterparts. Thus, it is well settled that absent an agreement to the contrary, a bank is legally obligated to repay a deposit only at the place where the deposit is made.[11]

B. Although the court of appeals correctly recognized the separate entity rule, it mistakenly concluded that the parties had elected to depart from that rule in this case and had agreed, instead, to make the deposits payable in New York. That conclusion is inconsistent with the terms of the standard Eurodollar transactions at the heart of this dispute.

The Eurodollar market has come into being largely because the United States gives special treatment to

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[9] It is well established that a foreign sovereign generally has broad authority to affect debtor-creditor relationships involving debts payable within its jurisdiction. See, *e.g.*, Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 Colum. L. Rev. 594, 612, 616 (1986). See also Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987); Restatement (Second) of the Foreign Relations Law of the United States § 17 (1965). Cf. *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J. concurring) ("If I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there.").

[10] This was true, for example, in pre-communist Vietnam. See *Trinh* v. *Citibank, N.A.*, 850 F.2d 1164, 1166 (6th Cir. 1988), petition for cert. pending, No. 88-1031.

[11] See, *e.g.*, *Det Bergenske Dampskibsselskab* v. *Sabre Shipping Corp.*, 341 F.2d 50, 53 (2d Cir. 1965); *United States* v. *First Nat'l City Bank*, 321 F.2d at 19-20; *McCloskey* v. *Chase Manhattan Bank*, 11 N.Y.2d 936, 183 N.E.2d 227, 228 N.Y.S.2d 825 (1962); *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. 742, 744, 249 N.Y.S. 319, 321 (City Ct. 1931); Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 930-931 (1979). England and other common law jurisdictions have long recognized that rule. See, *e.g.*, *Joachimson* v. *Swiss Bank Corp.*, [1921] 3 K.B. 110, 127 ("promise to repay is to repay at the branch of the bank where the account is kept"); *Clare & Co.* v. *Dresdner Bank*, [1915] 2 K.B. 576, 578 ("no obligation on a bank to pay in one country a debt due to a customer on current account in another country"). The civil law countries seem to follow that rule as well. See *Dame Ba Tu Thu Van* v. *Banque National de Paris*, Tribunal de grande instance de Paris, 9éme Chambre (Mar. 8, 1985), and *Dame Thi To Tam et autres* v. *Banque Francaise Commerciale*, Tribunal de grande instance de Paris, 9éme Chambre (Mar. 12, 1985), *reported in* Recueil Dalloz Sirey 500-501 (1985).

dollar-denominated deposits that are legally payable only abroad. Although United States bank deposits are generally subject to federal reserve requirements and deposit insurance assessments, which increase the costs to banks of acquiring such funds (see p. 3, *supra*), Congress and the Federal Reserve Board have exempted from those requirements bank deposits that are "payable only" outside the United States. See p. 3, *supra*; see, *e.g.*, 12 U.S.C. 461(b)(6); 12 U.S.C. 1813(*l*)(5)(A); 12 C.F.R. 204.1(c)(5) and 204.128. These exemptions provide the impetus for United States banks to participate in the Eurodollar market.

Financial institutions that accept deposits qualifying for exemption from reserve requirements and insurance assessments can achieve substantial savings in obtaining funds. See R. Dale, *The Regulation of International Banking* 12-13 (1986). United States banks have realized those savings by authorizing their foreign branches to accept dollar-denominated funds that are legally "payable only" at the foreign branch. By limiting repayment in that manner, United States banks are able to obtain dollar-denominated deposits abroad on the same basis as foreign banks, free from United States reserve requirements and insurance assessments, and are able to compete with foreign financial institutions in the international money markets. See 12 C.F.R. 204.128(c).

The federal government's regulatory exemptions, which provide a "forceful stimulus" and "the basic inducement" for United States banks to participate in the Eurodollar market (R. Dale, *supra*, at 12, 14, 23), impose an essential condition on that participation: the foreign branch deposit *must* be "payable only" abroad. A foreign branch deposit that lacks that essential feature receives the same regulatory treatment (and incurs the same associated costs) as a domestic dollar deposit. See 12 C.F.R. 204.128(c). Thus, the distinctive characteristic of a Eurodollar deposit is its place of payment. Indeed, international bankers and commentators generally *define*

Eurodollars as dollar-denominated deposits that have their situs outside the United States.[12]

Citibank and WFAL clearly understood that WFAL's funds would be placed with Citibank's Manila branch as Eurodollar deposits. WFAL placed its deposits with Citibank/Manila through the methods routinely employed in Eurodollar transactions. See Pet. App. 42a, 45a. The record indicates that WFAL's broker offered WFAL's funds on the Eurodollar market and that Citibank's Manila branch accepted WFAL's funds under the standard terms of a Eurodollar deposit at the prevailing Eurodollar interest rate.[13]

The testimony offered at trial concerning interest rates confirms that both Citibank and WFAL understood that WFAL's funds would be held as Eurodollar deposits. Citibank's and WFAL's respective experts disagreed on a number of matters, but they agreed that the difference between the rate of interest paid on the WFAL deposits (10%) and the lower rate that would be paid on a deposit placed with Citibank's New York office was attributable, at least in part, to the fact that the WFAL deposits were not subject to domestic reserve and insurance

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[12] See, *e.g.*, E. Roussakis, *Commercial Banking in an Era of Deregulation* 188 (1984); P. Oppenheim, *International Banking* 146 (3d ed. 1978); S. Robinson, *Multinational Banking* 162 (1972); M. Friedman, *The Euro-Dollar Market: Some First Principles*, in *The Eurodollar* 272, 275 (H. Prochnow ed. 1970); Harfield, *International Money Management: The Eurodollar*, 89 Banking L.J. 579, 585 (1972). WFAL's expert witness, Professor Gunter Dufey, agreed that "[a] Eurodollar deposit is a time deposit denominated in U.S. dollars in a bank or bank branch located outside the United States" (Tr. 632).

[13] WFAL's counsel stated at the outset of the trial that "these are very standard transactions" (Tr. 6). Citibank's executive vice-president and chief financial officer, Donald Howard, and WFAL's expert witness, Professor Dufey, described the transaction of Eurodollar placements in general terms that mirror the steps followed here. See Tr. 448-455, 474-478. Professor Dufey also acknowledged that "a dollar deposit with a Manila branch of Citibank is a Eurodollar deposit" (Tr. 638-639).

requirements.[14] As we have just explained, this would be true only if—as both of the commercially sophisticated parties must have understood—the WFAL deposits were "payable only" outside of the United States. See 12 U.S.C. 461(b)(6); 12 U.S.C. 1813(*l*)(5)(A).

The method and terms of the placement persuasively indicate that WFAL's funds were deposited as Eurodollars and were legally payable only abroad. The specific place for repayment was, of course, Citibank's Manila branch. Since WFAL deposited its funds with Citibank/Manila, the deposits had their situs at that branch. Under the general banking principles that the court of appeals cited (p. 13, *supra*), they were legally payable only at that location. The deposit was settled, as is customary in Eurodollar transactions, through interbank transfers between the parties' correspondent New York banks. But that method of settlement did not affect the situs of the deposits or constitute an agreement that would make them legally payable in New York.

The federal bank regulatory agencies administering the statutes that have, in essence, created the Eurodollar market are in agreement that the settlement of a Eurodollar transaction through electronic transfers between New York banks does not alter the situs of the deposit or render it legally payable in New York. The New York Clearing House Association (which has created the CHIPS mechanism for settling these transactions and clears approximately $750 billion in interbank payments each day) and the Institute of International Bankers (whose membership includes 230 banks from more than 50 countries) explain that there is simply no other feasible way to settle international dollar transactions. See N.Y. Clearing House Ass'n and Inst. of Int'l Bankers Amici Br. To our

[14] That view was expressed by Donald Howard (Tr. 443-444, 452), Serge Ballenger, a French bank executive (Tr. 863-864), and Ian Giddy, a business professor (Tr. 1032, 1088-1089) who testified on Citibank's behalf concerning international banking practices. The view was also expressed by WFAL's counsel in his opening statement (Tr. 63) and by Professor Dufey (Tr. 598, 601, 640, 704-706), who testified on WFAL's behalf.

knowledge, no market participant—including WFAL—has ever suggested that the routine transfer of funds through correspondent banks can change the situs of a deposit. That result would be manifestly inconsistent with the settled understandings of Eurodollar market participants and would alter the character and terms of Eurodollar deposits held throughout the world.

C. The court of appeals therefore erred in concluding that Citibank and WFAL had agreed to make WFAL's deposits payable in New York. As the foregoing discussion shows, WFAL placed its funds with Citibank/Manila as Eurodollar deposits that, by definition, were legally payable *only* outside the United States. The placements, by every relevant indication, were routine Eurodollar deposits legally payable only at their place of deposit—Citibank/Manila.

The court of appeals' error arises from its misunderstanding of the district court's somewhat confusing distinction between "repayment" and "collection" of a debt. As we have explained (p. 7, *supra*), the district court found that the parties had agreed that WFAL's deposits would be "repaid" in New York, but that they had reached no express understanding of where the deposits could be "collected." The court of appeals failed to comprehend the meaning that the district court had ascribed to these terms.

The district court used the term "repayment" to describe the place where the account would be settled. See Pet. App. 14a ("the location where the *wire transfers effectuating repayment* at maturity were to occur" (emphasis added)). It used the term "collection" to describe the place where the account was legally payable. See *Ibid.* ("the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers"). Thus, the district court simply found that the parties had expressly agreed to settle the transactions in New York, but that they did not state any express understanding of where the account would be legally repayable. Since they

had stated no express agreement on the latter question, they left it to be controlled—as is usually the case—by the general banking principle that a deposit is payable at the branch where it is made.[15]

The court of appeals was misled by the district court's unconventional terminology. It equated the district court's finding of an agreement respecting "repayment" with an agreement respecting where the deposits were legally payable and, as a consequence, gave WFAL something it did not bargain for and had no right to receive—dollar-denominated deposits that are *exempt* from federal reserve requirements and insurance assessments but *legally payable in the United States.* The court of appeals incorrectly transformed a standard instruction for clearing Eurodollar deposits in New York into an agreement that the head office will be liable for Eurodollar deposits. In effect, the court of appeals transformed WFAL's conventional Eurodollar deposits into a new hybrid creature that, like the centaur, can be imagined but does not exist.[16]

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[15] The court of appeals stated (Pet. App. 7a) that the district court's factual finding concerning repayment was not "clearly erroneous" (Fed. R. Civ. P. 52(a)), citing the district court's reliance on the parties' telex confirmations setting forth the routing instructions between the correspondent banks. See Pet. App. 16a-17a. However, the district court's exclusive reliance on those telexes simply underscores that it was addressing only the question of where the transactions would be settled and not where the deposits were legally payable. We note that a different case might be presented if withdrawals or deposits were actually made through an office of a bank located in this country to an office of that bank in a foreign country.

[16] Federal government enforcement actions involve additional considerations and are governed by express statutory provisions that mean they are not necessarily subject to the same rules that govern private contractual disputes between banks and their depositors. For example, in the case of forfeiture actions, the Comprehensive Drug Abuse Prevention Control Act of 1970 provides that "[a]ll right, title, and interest in the property [derived from narcotics transactions] vests in the United States upon the commission of the act giving rise to forfeiture" (21 U.S.C. 853(c)) and authorizes courts to enter orders "without regard to the location of any property that may be subject to forfeiture" (21 U.S.C. 853(*l*)). Likewise, federal law, rather than state law, determines the United States' remedies as a creditor seeking to levy on taxpayers' accounts, *United States* v. *National Bank of Commerce*, 472 U.S. 713, 726-733 (1985), and the United States' right to a temporary injunction freezing assets under the control of a foreign branch, *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 383-385 (1965).

II. THERE IS NO OCCASION TO CONSIDER WHETHER FEDERAL LAW GOVERNS THIS CONTROVERSY BECAUSE IT IS AT BEST DOUBTFUL THAT EITHER PHILIPPINE OR NEW YORK LAW IMPOSES AN OBLIGATION ON CITIBANK TO REPAY THE DEPOSITS OUT OF CITIBANK'S NON-PHILIPPINE ASSETS

Absent an agreement between the parties altering the general legal rule that "a debt on a deposit normally authorizes a demand for the money only at the relevant branch" (Pet. App. 6a), general banking principles dictate that WFAL's deposits are legally payable only at Citibank/Manila. The proper question in this case then becomes whether Citibank has committed an actionable breach of the deposit contracts by wrongfully refusing payment at *that* location.

There can be little doubt that the district court correctly determined that the Philippine decree—MAAB 47—prevented Citibank/Manila from repaying the full amount of WFAL's deposit out of the assets of Citibank/Manila. MAAB 47 prohibits "[a]ny remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks" without prior approval of the Philippine Central Bank. Although the Central Bank has permitted Citibank/Manila to use its non-local assets in partial discharge of the deposit obligations (Pet. App. 34a), it has not permitted Citibank/Manila to remit the balance of the obligations out of its Philippine assets. Thus, the critical issue that divided the parties below, and which the court of appeals did not reach, is whether Citibank/Manila must look to Citibank's non-Philippine assets in order to satisfy the deposit obligation. In its

first judgment, the district court identified an obligation to look to Citibank's non-Philippine assets grounded in Philippine law; in its second judgment, the district court held that WFAL could reach Citibank's general assets under principles of New York law.

Although this Court's normal practices would call for a remand to allow the court of appeals to consider these alternative theories in the first instance, we nevertheless set forth several considerations that should bear on the proper resolution of these issues, in the event the Court finds it appropriate to address them. In either event, if it is ultimately determined that neither Philippine law nor New York law requires that a deposit placed with Citicorp/Manila be repaid out of Citicorp's United States assets, there would be no occasion to consider the broader issues of federal law presented by Citicorp.

A. The district court found that it was "not disputed that the Decree currently prevents Citibank's Manila branch from using its Philippine assets toward repayment of the Deposits" (Pet. App. 30a); it accordingly concluded that Citibank was not in breach of the deposit agreement insofar as repayment was required out of Citibank/Manila's assets. This conclusion follows from the separate entity doctrine: a bank deposit that is legally payable in a foreign country is generally subject to the laws of that country and to the attendant risk that the foreign sovereign may alter the parties' rights and obligations. In this case, WFAL's deposits with Citibank's Manila branch are subject to Philippine law. The Philippine government obviously can change that law, and, thus, it is fair to say that *both* Citibank and WFAL voluntarily assumed a risk that the Philippine government might alter the terms for repayment of a debt made payable within its territory.[17]

[17] For this reason, it cannot be regarded as unfair to subject WFAL, as well as Citibank/Manila, to the risk of foreign sovereign interference with deposits placed with foreign branches. In this instance, for example, the Philippine government imposed a restriction on the repayment of dollar-denominated accounts that effectively freezes the principal, but permits WFAL to continue to earn interest. The Philippine government has authorized Citibank/Manila to pay that interest, in dollars, to WFAL, until the government's monetary difficulties are resolved. Thus, although WFAL cannot gain access to its principal, Citibank/Manila cannot extricate itself from the obligation to continue to pay interest on that principal at the rate agreed upon in 1983. Both Citibank and WFAL therefore bear part of the burden of the Philippine government's decree, as well as the risk of future government action.

WFAL's primary contention in the lower courts was not that Citibank/Manila was in breach of the deposit agreements because of its failure to use its own assets to repay the obligations. Rather, WFAL contended that Citibank/Manila was required to call upon the world-wide assets of Citibank, including those held by branches outside the Philippines, to satisfy the deposit obligations incurred by the Manila branch. The district court, in its initial judgment, agreed with this contention, concluding (Pet. App. 35a) "that under Philippine law Citibank's worldwide assets are available for satisfaction of plaintiff's claim, and that the Decree does not prevent transfer of such assets from outside the Philippines to Manila in order to repay the Deposits."

Although we do not take any concluded position on the issues of Philippine law presented by this case, it is a matter of some doubt whether the district court's initial judgment was correct. In finding that Philippine law made Citibank's worldwide assets available to satisfy WFAL's claim, the district court placed primary reliance on two authorities. The first was a 1934 decision of the Philippine Supreme Court, *National City Bank v. Posadas*, 60 Phil. 630 (1934), aff'd, 296 U.S. 497 (1936), holding that the doctrine of intergovernmental tax immunities prohibited the territorial government of the Philippines (as it then was) from imposing a capital and deposits tax on a branch of a national bank of the United States. The second was a telex from the Philippine central bank authority, indicating that it would not object if Citibank/Manila sought to repay the deposit obligations out of non-Philippine assets. Pet. App. 35a. Neither authority, however, provides that deposits placed

with the Philippine branch of a foreign bank are regarded as general obligations of the home office of that bank, repayable out of non-Philippine assets.

On appeal, Citibank presented additional Philippine authorities, including a letter from the Senior Deputy Governor of the Central Bank of the Philippines. Citibank C.A. Br. Add. A. The letter explained that the previous telex had merely stated that MAAB 47 would not be violated on the assumption that "either a court declared as a matter of law that payment was required by the non-Philippine office of a foreign bank or that the parties agreed by way of settlement to payment by a non-Philippine office." *Id.* at 2. The letter further stated (*id.* at 1):

> [T]here is no obligation imposed under Philippine law on a foreign bank to remit funds to its Philippine branch to pay deposits whose payment has otherwise been temporarily suspended as aforesaid stated. Nor is there an obligation imposed under Philippine law that the foreign bank pay the Philippine branch deposits in those circumstances at branches outside the Philippines.

After the court of appeals remanded the matter to the district court, the district court took note of the additional materials adduced by Citicorp, stating (Pet. App. 14a) that "[h]ad Citibank made a motion before us to reconsider our decision on the basis of this additional authority, we certainly would have granted such a motion * * *." The district court then proceeded to reexamine the issues presented in the case on the assumption that New York law, rather than Philippine law, would apply.

It thus appears that there is at least substantial ground to believe that the district court's construction of Philippine law in its initial judgment may have been erroneous. And if it turns out that Philippine law does not in fact impose risk of sovereign interference on the home offices of banks maintaining branches in the Philippines, then it will be unnecessary to decide whether such a rule would be inconsistent with federal law.[18]

B. The district court, in its second judgment, held that New York law imposed liability on Citibank for losses due to foreign sovereign risk sustained by depositors of Citibank/Manila. In the absence of preemptive federal law, we agree that New York courts would have the power to create a cause of action against New York based banks that does not exist in the country where the bank's foreign branch is located. And indeed, the New York Court of Appeals apparently exercised that power in *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), which concluded that the Bolshevik government's seizure of a New York bank's Russian branch did not discharge the bank's liability to a depositor who had originally placed his funds with the New York office for deposit at the Russian branch. The court determined, on the pleadings, that the depositor could maintain an action "based upon the theory of rescission with an accompanying right to restitution" or "based upon the theory of the breach of an outstanding contract" (239 N.Y. at 171, 145 N.E. at 921).

Properly construed, however, we do not believe that *Sokoloff* requires a finding of liability in the circumstances presented by this case. As an initial matter, *Sokoloff* dealt with the acts of a government that the United States did not recognize and that therefore did not qualify as acts of state. See *Sokoloff*, 250 N.Y. 69, 81, 164 N.E. 745, 749 (1928). The Republic of the Philippines, in contrast, is a duly recognized sovereign government whose judgments and decrees are entitled to respect in United States courts insofar as they reflect that nation's exercise of authority over assets within its

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[18] If Philippine law does make deposits placed with Citibank/Manila a general obligation of Citibank, a United States court might not be obligated to enforce such a judgment if it would be inconsistent with United States law and policy. See *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895).

territory. See generally *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).[19]

In addition, *Sokoloff* by its terms provides a remedy only for depositors who place funds with a United States bank for deposit in a foreign branch. The New York courts have not extended the rationale of the decision to give a remedy to a foreign depositor, such as WFAL, who places deposits directly with the foreign branch of a United States bank. See *Sokoloff* v. *National City Bank*, 130 Misc. 66, 87, 224 N.Y.S. 102, 128-129 (Sup. Ct. 1927), aff'd, 223 A.D. 754, 227 N.Y.S. 907 (1928).[20]

Finally, even if WFAL were a domestic depositor, it still would qualify for relief under *Sokoloff* only if Citibank had wrongfully refused to repay the deposit. As Justice Harlan explained *Sokoloff's* application in the case of a Uruguayan bank account:

[19] For example, the Second Circuit has held that the act of state doctrine generally requires U.S. courts to refrain from questioning the foreign sovereign's actions with respect to bank deposits that have their situs within the foreign country. Compare *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222 (1985) with *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516 (1985). See also *Garcia* v. *Chase Manhattan Bank, N.A.*, 735 F.2d 645, 650 n.5 (2d Cir. 1984) ("where a foreign government has both the parties and the *res* before it and alters their relationship thereto, our courts realize that there is little that they can do to change the legal relationship"); see generally, Note, *supra*, 86 Colum. L. Rev. at 594.

[20] As the *Sokoloff* referee stated in subsequent proceedings, "we are not concerned with questions of liability for transactions originating in Russia and wholly to be performed in Russia, but with a debt incurred in this State which the defendant agreed to pay on demand at its own branch in Petrograd." *Sokoloff* v. *National City Bank*, 130 Misc. 66, 73-74, 224 N.Y.S. 102, 114-115 (Sup. Ct. 1927), aff'd, 223 A.D. 754, 227 N.Y.S. 907 (1928). The trial court subsequently made a similar point in determining the measure of damages. 130 Misc. at 87, 224 N.Y.S. at 128-129. See also *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 88, 193 N.E. 897, 903 (1934); *Dougherty* v. *National City Bank*, 157 Misc. 849, 862-864, 285 N.Y.S. 491, 506-508 (Sup. Ct. 1935); Restatement (Third) of the Foreign Relations Law of the United States § 414 reporter's note 6 (1987) (characterizing *Sokoloff* as involving a "New York depositor").

> The bank account is a contract for payment on demand at the Montevideo branch. If demand were wrongfully refused, a cause of action for breach of contract would be created on which [the depositor] could sue in New York. Thus, analytically, it is not the account itself which would become payable in New York, but damages for breach of the contract to pay on demand in Montevideo.

United States v. *First Nat'l City Bank*, 379 U.S. 378, 405 n.27 (1965) (Harlan, J., dissenting). Thus, unless Philippine law requires that a deposit placed with Citibank/Manila be repaid out of Citibank's general assets, Citibank/Manila's refusal to repay the deposit cannot be regarded as "wrongful" under New York law. And if Citibank's action was justifiable under the law in effect at the place where the deposit was made—the Philippines—it cannot be converted into a cause of action in New York.[21]

C. It is also important to consider how any rule of law that purported to hold United States banks liable for

[21] New York has provided by statute that "branch offices [of a bank] in any foreign country shall be liable for contracts to be performed at such branch office or offices to no greater extent than a bank * * * organized and existing under the laws of such foreign country would be liable under its laws." N.Y. Banking Law § 138(1) (McKinney 1990). See also *Tillman* v. *National City Bank*, 118 F.2d 631, 633, 635 (2d Cir.), cert. deined, 314 U.S. 650 (1941); *Tat Ba* v. *Chase Manhattan Bank, N.A.*, 616 F. Supp. 10 (S.D.N.Y. 1984), aff'd without opinion, 762 F.2d 991 (2d Cir. 1985). The Second and Sixth Circuits have mistakenly suggested that if a bank closes a foreign branch, "the situs of the debt represented by the deposit would spring back and cling to the home office." See *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), cert. denied, 459, U.S. 976 (1982); *Trinh* v. *Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), petition for cert. pending, No. 88-1031. As we explained in our amicus curiae brief at the petition stage in *Trinh* (at 11-14), that conclusion rests on a misunderstanding of the *Sokoloff* decision. The New York Court of Appeals did *not* determine that the closure of a branch office altered the situs of the debt. The "spring and cling" proposition is a commentator's inaccurate description of the case. See *Vishipco Line*, 660 F.2d at 864, citing Heininger, *supra*, 11 Law & Po. Int'l Bus. at 975.

sovereign interference with foreign deposits would affect the law and policy of the United States. One consequence of such a rule is that it could increase the incidence of such foreign sovereign interference, because the costs to depositors would be shifted at least in part to the home offices of United States banks.[22] The potential liability in turn could induce United States banks to reduce the assets of their foreign branches, in order to limit their exposure to such potential risks. Such a reaction would diminish the financing available to United States businesses abroad and to local economies where the branches are located, contrary to United States policy.

Of more immediate concern, imposing liability on the head offices of United States banks for foreign deposits that have been frozen or restricted would threaten the bank regulatory framework. Such additional liabilities would present substantial risks for the system of federal deposit insurance supervised by the FDIC. Insurance assessments, which exempt the deposits of United States banks that are payable only abroad, play an important role in assuring the safety and soundness of the United States banking system, and they reflect, to a degree, the federal government's evaluation of the potential liabilities of United States banks.[23]

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[22] That concern is even more substantial in the case of *Trinh* v. *Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), petition for cert. pending, No. 88-1031, which involves an expropriation of the assets of a foreign branch of a United States bank.

[23] Further, to the extent that the FDIC has determined that such deposits are "payable only * * * outside the United States," the FDIC has no statutory authority to impose insurance assessments on the deposits of a foreign branch. See 12 U.S.C. 1813 (*l*)(5)(a). Conversely, to the extent that foreign Eurodollar deposits are transformed into deposits payable in the United States, the FDIC would be required by statute to impose insurance assessments and to take substantial administrative steps to deal with its increased obligation to supervise potentially billions of dollars in additional deposits.

In addition, the Federal Reserve Board's reserve requirements, which also exempt foreign deposits, are a key tool in the conduct of monetary policy in the United States. The Board's longstanding exemption of deposits that are legally payable abroad is based, in part, on the understanding that:

> A customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals.

12 C.F.R. 204.128(c); 35 Fed. Reg. 2768 (1970).[24] If it turns out that the United States bank's home office—rather than the customer—bears that risk, then a basic premise of the current monetary system would be destroyed.

The repudiation of the premises underlying federal banking regulations would require a fundamental reassessment of the exemption from insurance assessments and domestic reserve requirements for deposits payable only abroad. United States banks maintain billions of dollars of foreign branch deposits in potentially unstable countries. The federal government established its present reserve requirements and insurance assessments on the

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[24] This point is reflected in the Federal Reserve Board's original decision, rendered in 1918, to exempt deposits payable only abroad from domestic reserve requirements. The Board observed that Congress had vested it with discretion "as to the restrictions to be imposed upon the operations of foreign branches in order to assure that the interests of the parent bank might be safeguarded and the creditors in this country be protected." 4 Fed. Res. Bull. 1123 (1918). Thus, the Board clearly expected that foreign branch depositors would rely on—and be subject to—foreign government regulation of their deposits. As time progressed, reserve requirements came to be recognized largely as an important tool of monetary policy. In 1970, the Board formally incorporated the interpretation exempting deposits in foreign branches from reserve requirements into its regulations. 12 C.F.R. 204.9 (1988). In 1980, Congress amended the Federal Reserve Act to incorporate the Board's 70-year-old exemption (12 U.S.C. 461(b)), indicating that it intended to preserve "the classifications as between domestic and foreign deposits which have been developed under existing law." H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979).

understanding that United States banks are not liable for foreign sovereign action that may restrict the availability of those funds. If that understanding is incorrect, then the relevant federal agencies will have to determine whether to increase insurance assessments and reserve requirements in order to cover the risks inherent in foreign deposits that may be subject to foreign sovereign action. If foreign deposits are found to be payable in the United States as a result of such action, then the deposits would by statute become domestic deposits for purposes of insurance assessments and a fundamental reassessment of the applicability of reserve requirements to such deposits would be required. As a result, the domestic costs to United States banks would substantially increase and United States banks would find it more difficult and costly to participate in the Eurodollar markets. Such a change in current practice would have serious implications for the foreign relations of the United States.

As previously observed, these starkly undesirable alternatives need not be confronted if WFAL's deposits are found not to be payable out of Citibank's general assets. Moreover, if it is concluded that neither Philippine nor New York law requires repayment out of United States assets, then there would be no need to articulate a federal common law rule to protect federal interests in this case.[25] If a United States bank's home office is not liable for foreign sovereign interference with a foreign branch's obligation to repay deposits that are legally payable only abroad, then the federal bank regulatory framework is consistent with, and indeed reflects, that established principle of banking law.

[25] There may be cases where it is appropriate for United States courts to rely on federal common law or federal preemption to protect federal interests in international banking disputes. Indeed, the federal act of state doctrine, related doctrines, and the exceptions thereto indicate that judicially made federal common law may figure prominently in such cases. We submit, however, that the proper application of general banking law principles, as we have described them, may well adequately protect federal interests in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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BRIEF

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No. 88-1260

IN THE
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CITIBANK, N.A.,
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS, *AMICI CURIAE* SUPPORTING REVERSAL

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This brief is in support of reversal and is filed pursuant to Rule 37.3 with the consent of all parties.

Interest of *Amici Curiae*

The court of appeals held petitioner Citibank, N.A. liable to pay in New York the balance owing on Eurodollar deposits made in its Manila branch, despite an order of the Philippine government suspending the branch's duty to pay. The court of appeals concluded that by specifying that payment of the deposits would be cleared through their New York correspondents the parties had in effect agreed that

demand could be made for payment in New York. That conclusion calls into question the legal status of hundreds of billions of dollars of Eurodollar deposits throughout the world, virtually all of which are to be repaid at maturity by remittance and clearing through New York correspondent banks and the Clearing House Interbank Payments System ("CHIPS"), the principal international dollar payments system.

The New York Clearing House Association (the "Clearing House") is an association of eleven leading commercial banks in the City of New York.[1] It clears commercial drafts and items in the New York area and operates two electronic payment systems, including CHIPS, the functioning of which lies at the heart of this litigation. (*See* 45a).[2] The Clearing House regularly appears as an *amicus curiae* in cases raising significant questions of law relating to banking.

The Institute of International Bankers is an association of more than 240 foreign banks, from over 50 countries, with operations in the United States. One of the Institute's principal objectives is to present the views of foreign banks operating in the United States on issues of federal and state laws and policies affecting those operations. To this end, the Institute has participated, by filing briefs *amicus curiae*, in cases raising significant legal issues that affect the United States operations of foreign banks.

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, and European American Bank.

[2] Citations in the form "—a" are to the Appendix to the Petition; citations in the form "R.—" are to the trial record.

The member banks of the Clearing House and the Institute are major participants in international banking. As of year-end 1988, for example, of the total of 854 branches operated in foreign countries by all United States banks that are members of the Federal Reserve System, 403 were operated by Clearing House banks, and the total deposit liabilities of the Clearing House member banks' foreign branches exceeded $145 billion. The operations of the Institute's member banks include subsidiary banks, branches, agencies and representative offices in the United States.

The *amici* organizations represent domestic and foreign banks that place and accept United States dollar deposits, commonly referred to as Eurodollar deposits, at thousands of locations outside the United States. Although these banks have widely divergent economic interests as Eurodollar depositors or depositaries—and, indeed, various of them have substantial sums of blocked funds on deposit at Citibank/Manila—they also have a common and fundamental interest in the recognition and consistent application of clear and certain rules of law to the field of international banking. Because the decision below represents a radical departure from settled law that could cause considerable turmoil in the practice of international banking, *amici* believe that a reversal is required to secure their common interest.

Statement

The transactions at issue are two $1 million Eurodollar deposits made by Wells Fargo Asia Ltd. ("WFAL"), a Singapore bank owned by Wells Fargo Bank, N.A., with Citibank, N.A.'s branch office in Manila ("Citibank/Manila") in June 1983. (3a). Eurodollar deposits are simply dollar-denominated deposits made with, and repayable by, bank offices outside the United States. (42a).

A typical Eurodollar interbank placement (such as WFAL's with Citibank/Manila) generally involves four banks and proceeds as follows. The bank making the placement (Bank A) agrees by telephone or telex, often through brokers, to place a dollar-denominated deposit with a second bank (Bank B). The deposit-taking Bank B must be an office of a United States or foreign bank located outside the United States, but the depositor, Bank A, can be a bank located within or outside the United States. *See* C. Scanlon, *Definitions and Mechanics of Eurodollar Transactions,* in THE EURODOLLAR 21 (H. Prochnow, ed. 1970).

Bank A makes the deposit by means of a wire transfer of funds via the CHIPS system from a dollar account maintained with a New York correspondent bank (Bank C) to Bank B's New York correspondent (Bank D), for crediting to Bank B's dollar account with that bank. These transfer arrangements are generally set forth in concise confirmation slips that specify both the financial terms agreed to and an identification of the dollar accounts to be debited and credited. (15a-16a). *See* C. Scanlon, *supra,* at 24-25; *see also Delbrueck & Co.* v. *Manufacturers Hanover Trust Co.*, 609 F.2d 1047, 1049 n.1 (2d Cir. 1979).[3] In this case as in the typical instance, the Eurodollar deposits made by WFAL were sent to Citibank/Manila through its New York

[3] In this case WFAL's correspondent was Wells Fargo International Banking Corporation, an affiliate of its parent, and Citibank/Manila's correspondent was its New York home office, Citibank, N.A. The clearing fees involved, however, were charged by their respective correspondents against WFAL's and Citibank/Manila's accounts. *See, e.g.*, Testimony of Rafael B. Buenaventura, R. 903. Internal bank policy generally favors the use of an affiliated entity as correspondent, but for purposes of determining the deposit-taking branch's liability to repay, the identity of its correspondent bank is legally irrelevant. *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985).

correspondent and added to its general funds. These funds were maintained as assets of the Manila branch for *its* use, not that of Citibank, N.A. in New York. (Testimony of Donald S. Howard, R. 447-48; Brief for Respondent in Opposition at 3 (Mar. 17, 1989)).

The telex confirmations between Bank A and Bank B (or their brokers) will also typically provide for repayment of the deposited funds, essentially by the reverse process with a transfer of funds from Bank B to Bank A by way of instructions to Bank B's New York correspondent (Bank D) to debit Bank B's dollar account and transfer the funds through CHIPS to Bank A's New York correspondent (Bank C) for crediting to Bank's A's account in the United States or elsewhere. (*See* 3a). Whatever the routing instructions may be, the repayment obligation is owed at all times by the offshore deposit-taking foreign bank or foreign branch to its depositor. That fact was stated clearly in Citibank/Manila's telex confirmation of its repayment obligation to the Singapore depositor: "At maturity *we remit* U.S. Dlr 1,049,444.44 *to your account* with Wells Fargo Bank Intl Corp NY *through* Citibank New York." (*Id.*) (emphasis added).

Large dollar transactions such as the Eurodollar interbank placements involved here can only be settled through the CHIPS system in that delivery of cash is impractical and the settlement of dollar deposits is ultimately controlled by the central bank of issue, the Federal Reserve System of the United States.[4] F.A. MANN, THE LEGAL ASPECT OF MONEY 194 (4th ed. 1982); M. STIGUM, THE MONEY

[4] The only significant dollar clearance system outside the United States is located in Tokyo and nets payments among Japanese banks; net balances among these clearing banks, however, are then cleared through CHIPS and settled by accounts maintained at the Federal Reserve Bank of New York.

Market 205-06 (5th ed. 1990); P. Smedresman and A. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws,* 64 N.Y.U. L. Rev. 733, 745 (1989). As explained in M. Mayer, The Money Bazaars 96 (1984), "Eurodollars may be domiciled abroad, but their use inevitably takes them through the United States. The only 'real' dollars are those created under the aegis of the U.S. Government, and the only lender of last resort that can create dollars in time of need is the Federal Reserve System."

The necessity of clearing large dollar payments in New York is such that approximately 90% of all international interbank dollar transactions are cleared through the CHIPS system. CHIPS has 140 participant banks and clears approximately 146,000 transactions per day with aggregate payments averaging $750 billion, but ranging up to $1 trillion, daily. *New York Fed Task Force Studies Expansion of Fedwire, CHIPS System,* 53 Banking Reporter (BNA) No. 14, at 499 (Oct. 9, 1989); Ferris, *$1,100,000,000,000 a Day; Rapid Growth in Payments Pushes Wire Transfers Over Trillion-Dollar Plateau,* American Banker, Dec. 15, 1986, at 3; Federal Reserve Bank of New York, *Fedpoints 36: C.H.I.P.S.* (May 1986).

Payments through CHIPS are made on a provisional basis. During the day debits and credits are netted through computer terminals and balances are subject to final settlement at the end of the day on the books of the Federal Reserve Bank of New York. *See* E.G. Corrigan, Financial Market Structure: A Longer View 16 (Federal Reserve Bank of New York, Jan. 1987) *Reibor International Ltd.* v. *Cargo Carriers,* 759 F.2d 262, 264 n.1 (2d Cir. 1985). The significant credit exposures thus incurred by all participants in the CHIPS system to institutions

throughout the world and the importance of the dollar in international finance and commerce require assurance both of the ability of each participant to settle its outstanding accounts and the immediate restoration of the system in the event of computer or mechanical failure.

Accordingly, the Clearing House has required participants to set "bi-lateral limits" with respect to the maximum net dollar amount of payments to be received from other participants and by imposing "caps" on each participant's total net debit position. *See* Rules Governing the Clearing House Interbank Payments System (as amended Jan. 25, 1989) (the "CHIPS Rules"), Rules 13, 22 and 23. Moreover, payments may be cleared only through CHIPS participants who maintain their primary connection to the CHIPS computer from an office physically located in New York City and have an adequate backup connection to the CHIPS system in an approved nearby county. *See* CHIPS Rule 6.[5] Finally, participants must normally settle their accounts by 5:45 p.m. each day on the books of the Federal Reserve Bank of New York. *See* CHIPS Rules 13 and 19(a). Net balances owed must be settled by wiring funds to the Federal Reserve Bank, purchasing federal funds from another bank, or borrowing from the Federal Reserve Bank's discount window.

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[5] CHIPS Rule 6 provides in relevant part:

> "A [CHIPS] participant's primary connection to the system shall be located in New York City. Each participant is required to maintain an adequate backup connection to the system. . . .
>
> From the time the system opens until settlement is completed an officer authorized to take appropriate action on behalf of the participant in connection with its CHIPS operations, including, without limitation, the authority to make binding commitments for such institution in the amount of its aggregate gross debit positions over the system, shall be present and available in New York City."

The sum of the foregoing is that the parties making and repaying large Eurodollar deposits, such as WFAL and Citibank/Manila, have little if any practical alternative to routing their funds through New York correspondent banks able to clear through CHIPS and settle at the Federal Reserve Bank of New York. It is hardly surprising that the specific route the funds will follow is recited on the brief confirmations of those oral transactions, so as to enable clerks to carry out the payments and to provide a means of tracing "lost" funds. What is surprising is the ascription of decisive legal consequence to such routing instructions.

Summary of Argument

It is a general principle of the law merchant, accepted throughout the commercial world, that performance of a contractual obligation to pay money is governed by the law of the state where payment is due and can be demanded, *i.e.*, where the obligation has its "situs," which state consequently has jurisdiction to prescribe rules suspending or excusing payment. In the case of a bank deposit, the place of payment is the location of the branch bank of deposit. Not only have bankers conducted their business in reliance on these principles for decades, but the whole of federal regulation of the foreign operations of United States banks has been predicated on them.

The Second Circuit in this case—as in its earlier decision in *Vishipco Line, Inc.* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982), and as the Sixth Circuit in *Trinh* v. *Citibank, N.A.*, 850 F.2d 1164 (6th Cir.), *petition for cert. filed*, 57 U.S.L.W. 3455 (U.S. Dec. 20, 1988) (No. 88-1031)—purported to accept these principles but frustrated their logical application by fastening on facts of no decisional relevance. In *Vishipco* and *Trinh* those facts were the suspension of

Saigon branch operations in the face of the communist takeover. Here, the fact was the parties' recitation of simple routing instructions for the transmission of deposits owned by a bank in Singapore to a bank in Manila and back again upon repayment, which the court of appeals held changed the deposit situs from Manila to New York. The court of appeals' error was fundamental and of far-reaching consequence for banking and bank regulation.

It is important that this Court correct that error and direct the entry of judgment for Citibank. The Court may do so by properly applying the existing law merchant, which is entirely consistent with federal regulatory interests; by treating federal regulation as preemptive of the particular contrary reading of the general law by the court below; or by fashioning a federal common-law rule of decision. Whichever decisional path the Court chooses, the *amici* urge that the Court's decision be unequivocal and clearly caution the lower courts against the future adoption of specious grounds for avoiding the application of established principles governing international payment obligations.

ARGUMENT

I.

Eurodollar Deposits Are Legally Payable Only Outside the United States.

A. Eurodollar Deposits Are Placed with Offices of United States and Foreign Banks Located Outside the United States.

Banks and other entities hold vast dollar assets in banking offices outside the United States in the form of loans and other accounts payable or deposits. These offshore dollars, or "Eurodollars," reflect the role of the United States dollar as the world's principal reserve currency and means of exchange in international trade and finance, and are earned

through such activities as sales of the many goods and services that are priced in United States dollars, as well as by extensions of bank credits repayable in United States dollars. *See* P. OPPENHEIM, INTERNATIONAL BANKING 245 (5th ed. 1987); M. STIGUM, *supra*, at 208-211. The parties that hold such dollar assets are actively engaged in placing these funds with other foreign institutions on a short-term basis at attractive interest rates, pending their use and deployment elsewhere. The current market for such funds consists principally of banks trading dollars with other banks in what are commonly termed "Eurodollar interbank placements." *See* P. OPPENHEIM, *supra*, at 248.

Foreign dollar-denominated deposits were first made in European banks during the Cold War, when communist countries became concerned about the vulnerability of their dollar assets held in United States banks to political action by the United States. E. ROUSSAKIS, COMMERCIAL BANKING IN AN ERA OF DEREGULATION 188 (1984).[6] The use of Eurodollar deposits grew when foreign central banks liberalized exchange controls, allowing British and Swiss banks operating abroad, for example, to offer higher rates of interest for dollar deposits than could United States banks operating at home. *See* G. Bolton, *Background and Emer-*

[6] Such exercise of sovereign power over foreign assets dates from the Trading with the Enemy Act, 50 U.S.C. app. § 5(b) (1941), and has become increasingly common as one means to deal with hostile regimes and terrorist or other national security threats, *see, e.g.*, Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (1950) (formerly applied to the People's Republic of China and currently applied to North Korea, North Vietnam, South Vietnam and Cambodia); Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (1963); Iranian Assets Control Regulations, 31 C.F.R. § 535.201 (1980); Libyan Sanctions Regulations, 31 C.F.R. § 550.209 (1986); Panamanian Assets Control Regulations, 31 C.F.R. § 565.201 (1988).

gence of the Eurodollar Market, in THE EURODOLLAR, *supra*, at 11. The involvement of American banks in the offshore dollar market subsequently developed through a dramatic growth in their foreign branch networks to service the needs of international customers and of United States corporations doing business abroad for dollar-denominated loans. P. OPPENHEIM, *supra*, at 244-45; L. WEERAMANTRY and W. SCHLICTING, 9 BANKING LAW § 211.05 at 211-15 (1983).

While the majority of Eurodollar market participants are banks,[7] other participants include large industrial corporations, G. Bolton, *supra*, at 8, and non-bank financial institutions such as insurance companies, S. ROBINSON, MULTINATIONAL BANKING 190 (1972). More broadly defined, the Eurodollar market includes the end-users of these funds —the original non-bank depositors and ultimate non-bank borrowers—such as domestic corporate subsidiaries operating abroad, *id.*, and foreign companies and governments, E. ROUSSAKIS, *supra*, at 189. Use of these funds increased with the emergence of the dollar as the medium of exchange for international trade, the United States balance-of-payments deficit and the exemptions from domestic banking regulations provided for Eurodollar deposits. *Id.* at 188-89.

There is on deposit with foreign branches of United States banks over $40 billion in Eurodollar interbank placements. *See* 74 FED. RES. BULL. A55 (Dec. 1988). The Eurodollar has grown in importance to serve as "a free, global currency that enables the United States dollar to remain the principal currency for international trade and finance," P. OPPENHEIM, *supra*, at 259; *G. Bolton, supra*, at 15, and the Eurodollar market has become the principal means for

[7] The central banks of many countries also trade in the Eurodollar market. *See* G. Ferras, *Central Banks and the Eurodollar Market*, in THE EURODOLLAR, *supra*, at 87.

transfers of capital around the world.[8] It is thus in the strong interest of the United States to assure clear rules of law that foster the continued use of the dollar as the medium of exchange for international trade.

B. Foreign Branches of United States Banks Take Eurodollar Deposits Free of Significant Restrictions of Federal Banking Regulations.

The foreign branches holding Eurodollar deposits effectively function as foreign banks due to a federal regulatory scheme designed to allow them the maximum ability to compete with foreign-based banks engaged in similar activities in their respective host countries. National banks were given the authority to establish foreign branches by the Federal Reserve Act of 1913. All Federal Reserve System member banks—both state-chartered and national—must obtain the approval of the Board of Governors of the Federal Reserve System before establishing such foreign branches, "upon such conditions and under such regulations as may be prescribed by the said board." 12 U.S.C. §§ 321, 601 (1988); *see also* 12 C.F.R. § 211.3(a) (1989).[9] Similarly, state banks that are not members of the Federal Reserve System must obtain the consent of the Federal Deposit Insurance Corporation before establishing foreign branches. 12 U.S.C. § 1828(d)(2) (1988); 12 C.F.R. § 347.3(a) (1989). These foreign branches exist "for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States." 12 U.S.C. § 601 (1988).

[8] The Eurodollar market has also been described as "vital to the U.S. branch banks because of their relatively small host currency deposit base." S. ROBINSON, *supra*, at 288.

[9] National banks must also notify the Comptroller of the Currency upon applying to the Board of Governors for permission to establish a branch in a foreign country. 12 C.F.R. § 20.3(1) (1989).

There is a distinct federal regulatory scheme governing the operations of foreign branches in recognition that such branches are necessarily subject to the laws and regulations of the host country jurisdiction in which they maintain a physical presence and to protect the United States banking system from liabilities that might be imposed by the operation of such laws. 4 FED. RES. BULL. 1123 (1918). Thus, while foreign branches are not separately incorporated,[10] they are, for most purposes, treated as legally separate from their home offices. For example, each foreign branch must maintain its accounts independently of the parent bank and other branches and its profit or loss must be reported as a separate item in the ledger of the parent bank. 12 U.S.C. § 604 (1988). Moreover, foreign branches are authorized to engage in activities that are usually denied to domestic offices in order to permit them to offer the same services as foreign banks. 12 U.S.C. § 604a (1988); 12 C.F.R. § 211.3(b) (1989); *see generally* L. WEERAMANTRY and W. SCHLICTING, *supra*, at § 212.02. Deposits made in foreign branches are also exempt from the obligation to pay federal deposit insurance premiums. 12 U.S.C. § 1813(*l*)(5) (1988).

Perhaps of most relevance here, Congress has exempted deposits at foreign branches from the reserve requirements of the Federal Reserve Board, 12 U.S.C. § 461 (1988); 12 C.F.R. § 204.1(c)(5) (1989) ("Regulation D"), unless there has been a formal guaranty of payment by the home office, 12 C.F.R. § 7.7012 (1989). The Regulation D exemption represents a long-standing position of the Board of Governors that deposits made in foreign branches of U.S. banks are "payable only" at the foreign branch and do not

[10] Foreign governments often require American banks to operate only through local branches. *See Trinh* v. *Citibank, N.A.*, *supra*, 850 F.2d at 1169.

represent claims on the home office. Brief of the Federal Reserve Bank of N.Y. *Amicus Curiae* in the District Court at 6-10 (Jan. 9, 1987); 1 Fed. Res. Reg. Serv. at ¶ 2-330 (Staff Opinion, Feb. 23, 1982); *id.* at ¶ 2-330.01 (Staff Opinion, Mar. 21, 1983); *id.* at ¶ 2-330.1 (Staff Opinion, July 29, 1983); 12 C.F.R. § 204.128 (1989). Similarly, Regulation Q of the Federal Reserve Board, which limits the rate of interest United States banks can advertise and pay on demand deposits, does not apply to deposit obligations payable at foreign branches. 12 C.F.R. § 217.1(c)(2) (1989); *see* F. Morris & J. Little, *The Eurodollar Market Today: Size, Scope, and Participants,* in THE EURODOLLAR, *supra,* at 56.

As interpreted by the Board of Governors, Regulations D and Q together have the principal purpose and effect of enabling foreign branches to compete on an equal basis with foreign banks seeking deposits in the offshore banking market. 35 Fed. Reg. 2768 (1970). Congress adopted this interpretation in 1980 when it amended the Federal Reserve Act to incorporate the regulatory exemption from reserve requirements for "deposits payable only outside the states of the United States," 12 U.S.C. § 461(b)(6) (1988), stating that the "intent of the legislation [is] not to disturb the classifications as between domestic and foreign deposits which have been developed under existing law," H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979).

The critical premise of this federal regulatory distinction is sometimes described as the "branch-situs" or "branch-payable" rule and is fully consistent with ordinary choice of law rules providing that the law of the place of payment controls the obligation to pay money. *See, e.g., Allied Bank International* v. *Banco Credito Agricola de Cartago,* 757 F.2d 516 (2d Cir.), *cert. dismissed,* 473 U.S. 934 (1985); *Intercontinental Planning, Ltd.* v. *Daystrom, Inc.,*

24 N.Y.2d 372, 382, 300 N.Y.S.2d 817, 825 (1969); *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft,* [1939] 2 K.B. 678, 699 (C.A.); *see generally* F.A. MANN, *supra,* at 419-20 n.80 (citing cases from Italy, Holland, Austria, Germany, France, South Africa and Zambia).[11]

C. Eurodollar Deposits Are Payable at the Deposit-Taking Foreign Branch and Are Thereby Subject to Impairment by Foreign Law.

The exemptions under Regulations D and Q for Eurodollar and other foreign branch deposits are consistent with the legal and economic principle that the foreign depositor rather than the United States parent bank bears the risk that a foreign government will interfere with payment by the foreign branch. *See, e.g.,* 35 Fed. Reg. 2768, *supra* ("a customer who makes a deposit that is payable solely at a foreign

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[11] The branch-payable rule is originally derived from English case law involving foreign branches, *see Clare & Co.* v. *Dresdner Bank,* [1915] 2 K.B. 576, 578, and continues to be the law of England, *see, e.g., Libyan Arab Foreign Bank* v. *Manufacturers Hanover Trust Co.,* [1989] 1 Lloyd's Rep. 608 (Q.B.); *Libyan Arab Foreign Bank* v. *Bankers Trust Co.,* [1988] 1 Lloyd's Rep. 259 (Q.B.); *X AG* v. *A Bank,* [1983] 2 All E.R. 464 (Q.B.); *Arab Bank, Ltd.* v. *Barclays Bank, D.C.O.,* [1954] A.C. 495, 529 (Lord Morton of Henryton), 531 (Lord Reid) (H.L.); *see also* DICEY AND MORRIS ON THE CONFLICT OF LAWS 1292 n.51 (L. Collins 11th ed. 1987).

The branch-payable rule is similarly well-settled under United States law. As the Second Circuit stated in *Vishipco Line, Inc.* v. *Chase Manhattan Bank, N.A., supra,* 660 F.2d at 862: "The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried. . . ." (citation omitted); *see also Dunn* v. *Bank of Nova Scotia,* 374 F.2d 876, 877 (5th Cir. 1967); *United States* v. *First National City Bank,* 321 F.2d 14, 20 (2d Cir. 1963), *aff'd on rehearing,* 325 F.2d 1020 (2d Cir. 1964) (en banc), *rev'd on other grounds,* 379 U.S. 378 (1965); *Dougherty* v. *National City Bank,* 157 Misc. 849, 858, 285 N.Y.S. 491, 501 (Sup. Ct. Nassau Co. 1935) (H. Tweed, Referee); *Bluebird Undergarment Corp.* v. *Gomez,* 139 Misc. 742, 744, 249 N.Y.S. 319, 321-22 (City Ct. of N.Y. 1931).

branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals"); *Braka* v. *Bancomer, S.A.*, 589 F. Supp. 1465, 1471 (S.D.N.Y. 1984) (Sofaer, J.), *aff'd*, 762 F.2d 222 (2d Cir. 1985). That is precisely what occurred in this case.

The Eurodollar and other deposit debts of Citibank's Manila branch are certainly commercial obligations of the juridical entity as a whole and federal policy imposes a duty on a bank's head office to pay the debts of foreign branches that are closed voluntarily or become insolvent. 3 FED. RES. BULL. 198 (1917); *see* Petition at 9 n.5 (Jan. 25, 1989). But while the Manila branch remains open and solvent, it is equally clear that its contract obligations are subject to impairment by the laws of the Philippines as the place where payment is due. For example, in *Braka* v. *Bancomer, S.N.C., supra*, 762 F.2d at 224-25, the Second Circuit construed the legal effect of certain Mexican decrees issued in the midst of an economic crisis which required banks in Mexico to repay dollar-denominated deposits not in dollars but in pesos, and at a "special" exchange rate which resulted in substantial losses to the depositors. The deposits, though denominated in dollars, had been made and were payable in Mexico. The Second Circuit held the deposit accounts to be therefore subject to Mexican law, including Mexico's later-imposed exchange control law, and refused to impose liability on the deposit-taking banks in the United States for losses sustained by the depositors by virtue of the acts of the Mexican State affecting the currency terms of contracts subject to its jurisdiction. *See also Callejo* v. *Bancomer, S.A., supra* (reaching the same conclusion).[12]

[12] As a general matter, such currency controls are recognized by our courts under the Act of State doctrine as a valid exercise of a state's power within its territorial limits when in conformance with

(footnote continued on following page)

The banks involved in the *Braka* and *Callejo* cases were Mexican banks subject to personal jurisdiction in this country rather than foreign branches of American banks, but the cases would have had the same outcome whether the defendant had been (i) a New York bank having dollar deposit accounts payable at its Mexico City branch or (ii) the New York branch of a foreign bank having dollar deposit accounts payable at a Mexico City branch. In each circumstance, the deposit obligations would be entirely subject to the relevant Mexican exchange control decrees as the law of the place where payment was due, and the decisions in *Braka* and *Callejo* that Mexican law impairing the principal amount of those debts was a complete defense to a suit in this country for the entire principal would apply to the hypothetical suit against a New York bank or a foreign bank's New York branch as well.

The two $1 million deposit transactions at issue in this litigation were short-term obligations of one of Citibank, N.A.'s branches located outside the United States to pay dollars to WFAL, itself a foreign bank located outside the United States. As the district court recognized, the Eurodollar deposits made by WFAL bore a higher rate of interest than would have been borne by similar deposits placed with domestic branches of United States banks because these Eurodollar deposits—as with other foreign branch deposits —were free of the cost of maintaining noninterest-bearing

(footnote continued from prec ng page)

international law and reasonably necessary to control the value of the currency or to protect the foreign exchange resources of the state, or where the effect of such controls is (as here) to alter contract rights subject to the foreign state's local laws. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 822 (1987); *Banco Frances e Brasileiro, S.A.* v. *Doe*, 36 N.Y.2d 592, 598, 370 N.Y.S.2d 534, 539, *cert. denied*, 423 U.S. 867 (1975); *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 55-56, 295 N.Y.S.2d 433, 442-43 (1968).

reserves against them under requirements of the Federal Reserve Act and of paying insurance premiums under requirements of the Federal Deposit Insurance Act. (43a).

It would be thoroughly illogical, as well as inconsistent with the branch-payable rule reflected in the pervasive regulatory distinction between domestic and foreign branch obligations, to suppose that a Eurodollar depositor like WFAL could evade the risk of a Philippine restriction of its right to repayment merely because it had instructed its foreign branch debtor to transfer the funds owed on repayment to a New York bank account. The court of appeals nevertheless allowed WFAL the benefit of a right to demand payment in New York notwithstanding that restriction. In doing so it subordinated the undisputed and fundamental principle that Eurodollar deposits are by definition made and payable outside the United States to the mundane fact that the CHIPS payment and repayment mechanism involved in Eurodollar transactions requires clearance and settlement in New York City. As explained below, that was plain error.

II.

The Clearing of International Dollar Payments Through CHIPS Does Not Constitute an Agreement To Pay Dollars on Demand in New York.

The court of appeals erred by finding in ordinary CHIPS routing instructions an "agreement" to authorize WFAL's payment demand in New York. As explained above, Eurodollar deposits are by definition "payable only" at the deposit-taking branch—here Citibank/Manila—as would be the case with *any other* form of deposit in the same branch, whether evidenced by a passbook, a certificate of

deposit or otherwise. Repayment must therefore be demanded at the branch, in accordance with the general rule stated by the court of appeals: "[A] debt on a deposit normally authorizes a demand for the money *only* at the relevant branch." (6a) (emphasis added).

The court of appeals' decision that the mere clearing of foreign-deposited funds through a New York bank makes New York a situs of the debt is inconsistent with the Fifth Circuit's decision in *Callejo, supra,* declining to give such effect to the use of correspondent banks for remittances:

> "[T]he wheels of international finance . . . depend[ ] in large part on the lubricating influence of correspondent banks. [A rule that the transfer of funds through correspondent banks makes such banks a deposit situs] would mean that the deposits held by a bank would have different situses depending on the locations of the correspondent banks that first received them. Potentially a bank would have to comply with different laws for different deposits at a single branch."

764 F.2d at 1125; *accord Braka, supra,* 762 F.2d at 224.

An agreement that payment could be demanded in New York would have required an express guaranty of such payment by the home office, as is authorized by specific federal regulation. *See* 12 C.F.R. § 7.7012 (1989). But there was no such promise and no such guaranty. The entries on the form confirmation slips relied on by the court of appeals to create a New York-based payment obligation were nothing but an ordinary series of remittance (or wire transfer) instructions as to how Citibank/Manila would send payment back to WFAL. While WFAL chose to receive repayment into an account with Wells Fargo International Banking Corporation in "*New York*" (7a) (emphasis in opinion), the fact was irrelevant. The obliga-

tion to repay was that of the foreign branch, and the designation of a New York dollar account to receive the repayment meant *only* (as the district court found) that "the wire transfers effectuating repayment at maturity were to occur" in New York. (14a).

WFAL could *at any time* prior to repayment have altered its remittance instructions to Citibank/Manila; whatever form those instructions might have taken, they would have had no bearing on the situs of the payment obligation. In the common circumstance where a depositor instructs his bank to send funds due him by wire transfer "to" his own or another's account in another bank, the situs of the deposit account does not shift to make the deposit payable on demand at the designated destination.[13]

Here, WFAL chose to direct remittance to a New York dollar account, but under the court of appeals' reasoning an instruction to remit to a London Eurodollar account would presumably have made the deposits payable in New York as well since London Eurodollar remittances must also clear through New York. The perverse result of the court of appeals' decision has therefore been to impose a New York payment obligation with respect to multi-billions of dollars in deposit debts previously understood to be "payable only" abroad, and against which there are neither reserves nor insurance premiums maintained.

Refusal by the Manila branch to make payments as demanded would have given rise to a cause of action against

[13] For example, a mortgagor may choose to make his monthly payments by preauthorized, automatic transfers from his bank account in Houston to the account of the mortgagee in New York, or a parent may instruct his Phoenix bank to make regular remittances in a fixed amount to a college student's account in New York, yet these arrangements would not make the depositors' Houston or Phoenix accounts payable "at" the receiving bank "in" New York.

the home office for breach of the deposit contract, *unless excused by local law*. In such a circumstance "it is not the account itself which would become payable in New York, but damages for breach of the contract to pay on demand [at the branch]." *United States* v. *First National City Bank*, 379 U.S. 378, 405 n.27 (1965) (Harlan, J., dissenting). The court of appeals' conceptual error in this case was that it converted WFAL's localized right to demand payment in Manila into a transitory chose in action enforceable against Citibank, N.A. in New York notwithstanding the validity of Citibank/Manila's defense to nonpayment under Philippine law.

III.

The Payment Term of Eurodollar Contracts Providing for Collection Abroad Is Supplied as a Matter of Law and Cannot Be Changed by the Unilateral Action of Any Market Participant.

WFAL suggests that the potential market disruptions caused by the court of appeals' decision can be solved by Citibank "unilaterally" by "clarify[ing] its own views of its liability" to future customers. (Brief for Respondent in Opposition at 16 (Mar. 17, 1989)). Apart from WFAL's disregard for the impossibility of such "views" having any effect on the massive existing Eurodollar obligations, its "solution" would be an exercise in futility.

Most Eurodollar activity is now comprised of interbank funds trading of the type at issue in this case—banks placing deposits and borrowing funds in Eurodollars with and from other banks. This money market is conducted mainly by brokers and bank traders through telephone and telecommunication linkages among foreign banks and foreign branches of United States banks around the world. P.

OPPENHEIM, *supra*, at 248. The Eurodollar market involves global trading beginning each day in Singapore, moving to the Middle East, then to London, and finally to New York. While trading is conducted in many locations within each market, the centers of activity are London and New York. *Id.* at 246.

In the trading rooms of the banks involved traders continuously receive and give quotes of the prices at which they are willing to buy or sell funds with various maturity dates. The bid and asked quotations change rapidly with market conditions and deals are often concluded by contacting several banks for the best price within a matter of minutes. *See* C. Scanlon, *supra*, at 22-23. The telex confirmations containing instructions for the clearing of payment and repayment of the deposit funds are exchanged a day or more *after* the transaction. (46a).

In the present Eurodollar market, "[t]ime delays are kept to an absolute minimum; and offers to take or place deposits are made nearly simultaneously at the branches in several cities." S. ROBINSON, *supra*, at 195. The contract itself is therefore formed and exists *prior* to the sending or receiving of any telex confirmations. (3a; Pl. Ex. 93 at ¶ 4, R. 40-41). Because the Eurodollar market is an oral, nondocumentary market, it must function based on generally understood rules relating to the massive obligations incurred by its participants, and has to date concededly proceeded on the recognition that clearing instructions do not constitute agreements to pay at the place where clearing occurs.

Changes in documentation relating to remittance and clearing are thus in the first instance irrelevant to the underlying deposit contract. More importantly, because of the size and complexity of the Eurodollar market, no single participant is capable of effecting a change in the form of

agreement adhered to, and even groups of participants—such as the United States banks involved—would be unable to do so in the face of the multinational composition of and interests reflected in that market.

Moreover, the purpose of commercial law is not to give rise to "battles of forms" in which parties seek advantage over one another in otherwise simple and clearly understood transactions, the essential terms of which have always been supplied as a matter of law. Indeed, the process involved in changing forms already in use by thousands of institutions for a number of years as bare-bones confirmations of oral contracts is, as noted above, likely to be neither swift nor certain of accomplishment. The courts ought not to create such a burden without clear legal warrant, particularly when the consequences of doing so are as pernicious as they are here.

The court of appeals' decision is therefore not to be remedied by any effort to rewrite the terms of Eurodollar contracts to provide that deposits are payable on demand only at the relevant branch or that repayment is subject to possible supervening acts of the branch's host country. All parties in this sophisticated market had always understood, notwithstanding the court of appeals' decision, that Eurodollar accounts are foreign-booked interbank placements "payable only" abroad. (*See* Brief for the United States as *Amicus Curiae* at 15, 17 (Nov. 1989)). That understanding was fully consistent with the exemptions in Regulations D and Q from reservability and interest rate limitations as well as with general banking principles adhered to around the world that the obligation to repay money is governed by the law of the place where payment is due, in this case at Citibank/Manila. That any repayment of the deposits was subject to Philippine law was thus

an implied term of the Eurodollar deposit agreements giving rise to this litigation. Under that law, it is uncontested that Citibank/Manila has not breached its payment obligation.

Nor, we submit, should the court of appeals' error be left for correction on remand, as earlier proposed by the Government. (*Id.* at 17-20). This Court has the ultimate responsibility for the correct application of federal law and policy by federal and state courts alike. U.S. Const. art. VI, cl. 2. The court of appeals' decision in this case, and various other recent decisions as to head office liability, evidence a widespread confusion as to the substance or the relevance of these federal interests as they relate to international banking.

For example in *Trinh, supra,* the Sixth Circuit repeated the earlier error of the Second Circuit in *Vishipco, supra,* in allowing a Saigon branch depositor to recover its deposits from the branch's head office notwithstanding the Vietnamese government's seizure of the branch's assets and implicit assumption of its liabilities. In *Trinh* and *Vishipco* (as well as in this case (6a)), the respective courts of appeals purported to state the settled common-law rule that deposits are payable at the branch, *see supra* note 11, but then found novel and specious theories on which to avoid the consequence of the rule that it is the *depositor,* not the head office, that bears the risk of loss arising from the application of foreign law. *See Trinh, supra,* 850 F.2d at 1172 n.5 (deposits "spring back and cling" to the home office); *Vishipco, supra,* 660 F.2d at 862 (same); *Wells Fargo Asia Ltd.* v. *Citibank, N.A.* (7a) (standard CHIPS clearing instructions are agreements to pay in New York).

Whether articulated by this Court as a consequence of federal regulation or as a rule of federal common law (Petition at 12-13), or as a correct application of the law mer-

chant (Brief for the United States as *Amicus Curiae* at 9 n.12 (Nov. 1989)), the result must be to assure that the rules of decision applied by the lower courts reflect the controlling federal distinction between deposits payable abroad and deposits payable in this country. The court of appeals' failure to give effect to that distinction in this case has already created substantial commercial uncertainty in the operations of the Eurodollar market. Absent a clear pronouncement from this Court, there can only be a consequent increase in that uncertainty as well as in the risks and costs associated with the use of the United States dollar as the medium of international exchange.

Conclusion

For the reasons stated herein, The New York Clearing House Association and the Institute of International Bankers urge that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CITIBANK, N.A.,
Petitioner,
v.

WELLS FARGO ASIA LIMITED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF BANK OF MONTREAL, CREDIT DU NORD, MARYLAND NATIONAL BANK, AND THE TORONTO-DOMINION BANK AMICI CURIAE SUPPORTING AFFIRMANCE

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IN THE

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BRIEF OF BANK OF MONTREAL, CREDIT DU NORD, MARYLAND NATIONAL BANK, AND THE TORONTO-DOMINION BANK AMICI CURIAE SUPPORTING AFFIRMANCE

This brief is in support of affirmance and is filed pursuant to Rule 37.3 with the consent of all parties.

INTEREST OF AMICI CURIAE

Maryland National Bank ("Maryland National") is a national banking association formed under the laws of the United States and located in Maryland. Bank of Montreal and The Toronto-Dominion Bank are banking corporations chartered under Canadian law with offices in various countries around the world. Credit du Nord is a Societe Anonyme, formed under French law, engaged in the business of banking with headquarters in Lille, France, a central office in Paris, and offices throughout the world. Each of the *amici* is, and was in 1983, an active participant in the market for interbank deposits and might be affected by legal interpretations which

alter the operation of that marketplace.[1] In 1983, each placed a deposit with Citibank, N.A. ("Citibank") that was booked through the Manila branch of Citibank, which Citibank has repeatedly refused to repay. These deposits are still is dispute, and might be affected by the decision rendered by the Court in this case, particularly if novel principles of federal common law are created.

SUMMARY OF ARGUMENT

Citibank asks this Court to address two abstract questions that are raised neither by the legal decisions nor the factual determinations made by the courts below. The first question so posed is whether a United States bank must repay deposits when the government of the country where the deposit-taking branch was located "prevents the branch from repaying those deposits." The second question Citibank poses is whether the use of what it calls "standard instructions to route funds through New York" to pay the deposit at maturity can properly constitute an agreement by United States banks to be liable for deposits that are "taken or frozen by foreign governments."

These questions are irrelevant to this case. As everyone, including the United States as *amicus* in support of Citibank, recognizes, the district court held that Philippine law did not "prevent" repayment so long as the dollar funds used for repayment were not obtained through the liquidation of assets booked at the branch located in the Philippines. Indeed the Philippine authorities, upon request of Citibank, permitted the Philippine branch to liquidate assets on the branch's books which were not located in the Philippines for the purposes of repaying the deposits. One hardly would have

[1] Several *amici* are members of the Institute of International Bankers. While the Institute in its brief claims to "present the views of foreign banks" (at 2) on various issues, the *amici* members never saw the brief before it was filed, nor were their views solicited. The *amici* members believe the brief was not circulated generally to the membership before it was filed.

supposed that the Philippine authorities would have refused a request by Citibank for permission to pay off the deposits by using the other assets available to it worldwide, such as the federal funds available at its headquarters office in New York, the domestic paper of its commercial and individual borrowing customers with its network of branches in the New York City area, or the assets of its European branches. Citibank, of course, never bothered to make such a request of the Philippine authorities.[2]

The central issue raised by this case is whether as a matter of contract between the parties, Citibank is obligated to use non-Philippine assets to satisfy deposits accepted through its Manila branch. The Manila branch of Citibank is not a separately incorporated entity. It is an overseas office of Citibank, a national banking association organized under the National Bank Act. Under New York law, all of the assets of Citibank, wherever located, are available to answer for all of its obligations, wherever created.[3] No other rule is established by the National Bank Act. As the district court found, the laws of the Philippines are no different in this respect. 660 F. Supp. at 949. The critical significance of this issue is recognized by the United States as *amicus*. U.S. Br. at 21.

[2] In 1983 Citicorp's loans outstanding to the Philippines were approximately $1.6 billion. 1983 Citicorp Annual Report at 11. Citibank informed Wells Fargo that the reason it was not applying to the Central Bank for authority to repay the deposits was that "We are very much involved with the Advisory Committee that is negotiating the restructuring of the Philippine external debt. For this reason, we are very sensitive about any of our actions that might be construed as violative of the spirit of the moratorium. After the restructuring is over, we might have more flexibility in finding ways to ameliorate the situation you find yourself in." Jt. App. at 397-98.

[3] *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 167, 145 N.E. 917, 919 (1924); *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982).

In its startling refusal to meet its obligations, Citibank has made a series of shifting arguments in the courts below and before this Court. Thus the decisions of the District Court and of the Court of Appeals answer different contentions and accordingly take different approaches.[4] Citibank complains about these "inconsistent" approaches (Pet. Br. at 12-13), but once again asks this Court to decide in its favor on the basis of yet additional theories—involving the creation of new rules of federal common law—not previously argued. In the face of this the Court should appreciate that the decisions below reach a common result which is entirely consistent with *amici's* experience in and understanding of Eurocurrency market practices.

Because so much of Citibank's argument is based upon a self-serving view of the business practices and implied terms of the Eurodollar deposit market and because Citibank has asked this Court to forge unprecedented rules of federal common law, *amici* wish to share with this Court certain matters of public record and industry practices. Assuming *arguendo* that the Philippine government had any policy prohibiting Citibank from liquidating its worldwide assets to pay the deposits in question (a policy which has not been shown to exist), we nonetheless believe that a fuller understanding of market practices will confirm that the participants in the Eurocurrency market did not intend the nominal booking of a Eurocurrency deposit in a particular branch of a United States bank with international operations to subject the depositor to this "sovereign risk" of the government of the country in which the branch was located.

Moreover, this case is not one for the promulgation by this Court of the broad principles of federal common law which Citibank calls for. The interests of the United States can be otherwise protected. It is doubtful whether

[4] Responding to various and ever-shifting arguments advanced by Citibank, the courts below found that neither Philippine nor New York law relieved Citibank of its contractual obligations. Pet. App. 18a, 24a.

any rule promulgated solely under the authority of the United States could adequately deal with the subjects on which Citibank calls for this Court's intervention. These matters are largely governed by contract and there is no assurance that a "federal common law" rule would be honored by courts in other countries. Even less would it be binding on foreign competitors for the taking of deposits. To the extent, however, that the matters in question are appropriate to be governed by a federal rule of law, the effort is only appropriately undertaken by regulatory rulemaking, by act of Congress, or by an international convention.

ARGUMENT

I. Eurodollar Deposits Are Part of the Larger Eurocurrency Market Operating Under International Market Conventions

Citibank seeks to create the impression that "the general allocation of foreign sovereign risk" in the Eurocurrency market is on the interbank depositor when placing a deposit through an overseas branch of a United States bank. Pet. Br. at 15-16. Citibank also contends that this course of dealing was recognized by the district court in its findings of fact. To the contrary, the district court's findings of fact on this point are consistent with *amici's* understanding of how the market worked.

Citibank produced an affiant who testified that it was "inconceivable" that sophisticated Eurodollar depositors could claim ignorance of the fact that they were receiving a higher interest rate in exchange for the acceptance of local branch country risk. 612 F. Supp. at 356. Contrary to Citibank's claims, in 1983 *amici* as active participants in the Eurocurrency market understood that deposits with a branch of a bank were liabilities of the bank as a whole.

The internal procedures established by *amici* were consistent with this understanding and at least one *amici* bank had been under an internal directive not to make interbank deposits with banks representing Philippine

country risk for eighteen months before its deposit was placed. Thus, in placing their deposits, *amici* understood that they were not dealing with the risk of the country in which a particular branch of Citibank was located, but could look to Citibank as an entity and its worldwide assets.

Amici were not alone in their understanding that Eurocurrency deposits do not bear the country risk of the branch booking the deposit. The U.S. federal banking regulators in the "Country Exposure Reports" required of United States banks in FFIEC Forms 009 and 009a, assume that a bank should calculate, report and disclose its country risk to the regulators and public based on the understanding that Eurodollar deposits do not bear the risk of the deposit-taking branch office.[5]

Also, as the two examples we describe below illustrate, market practice at the time was fully consistent with this understanding. Thus, in 1983 Maryland National placed $8 million of interbank deposits through New York deposit brokers that quoted rates on a blind basis. Reflecting the long-standing market practice at that time concerning the relevant question on risk allocation, Maryland National asked whether the deposit was to be with a "full branch" or a "subsidiary". If the deposit was to be with a "full branch," Maryland National understood that it was accepting the overall risk of the bank. If the response was "subsidiary," Maryland National understood it was being asked to accept the local country risk of the subsidiary. The location of the banking office was not disclosed until *after* other terms—including rate—had been agreed upon. Maryland National considered the

[5] *See* Federal Financial Institutions Examination Council Forms FFIEC 009, 009(a). Page 4 of the "Instructions for Preparing the Country Exposure Report" to Form FFIEC 009 specify that "Claims on bank branches and agencies are assumed to carry the 'guarantee' of their head office." Jt. App. at 425, 427.

identity of the particular booking branch to be an internal accounting decision for Citibank.[6]

Bank of Montreal placed a deposit of $8 million with Citibank. When Bank of Montreal's Singapore office was approached in Singapore by the Manila office of Citibank on July 29, 1983, Bank of Montreal did not understand that it would be accepting Philippine country risk. Citibank asked Bank of Montreal for a "bid/ask" quote, which is a quote that provides a rate Bank of Montreal would pay for a deposit from Citibank and a rate at which Bank of Montreal would place a deposit with Citibank. Once the bid/ask quote is made, the quoting bank is bound to either accept a deposit or place a deposit at the choice of the requesting bank. When making its quote Bank of Montreal did not know whether Citibank would choose to accept a deposit from Bank of Montreal or place a deposit with Bank of Montreal.

Upon receiving Citibank's request for a quote, Bank of Montreal responded it would accept a deposit from Citibank at 10 9/16% or place a deposit with Citibank for 10 11/16%. The difference or "spread" between these quotes was one eighth of a percent. Without a doubt, Bank of Montreal did not charge a country risk premium for placing a deposit through a Citibank branch in the Philippines. As even Citibank's expert witness has written, one eighth of a percent is the typical bid/ask spread in the Eurodollar market under normal market condi-

[6] Citibank asserts that a broker acting on behalf of Wells Fargo approached Citibank to place funds offshore. On the contrary, Maryland National placed its deposit through New York brokers, who were compensated equally by both Citibank and Maryland National under market custom. Maryland National has been informed that the New York brokers had firm orders from Citibank to accept deposits for Citibank's Manila branch, even when the markets in Manila were closed. This indicates an aggressive attempt by Citibank to obtain funds to be booked at the Manila branch. Contemporaneous news reports suggest that Citibank was attempting to shift funding for its Manila branch from internal funding to third-party depositors. *Wells Fargo Sues Citibank Over Manila Deposits*, Wall Street Journal, Feb. 23, 1984, at 40.

tions.[7] At that date and time, Bank of Montreal's Singapore office would have quoted the same rate and spread to various officers around the world of banks of equivalent credit risk as Citibank. To say that its quote somehow reflected Philippines sovereign risk is to enunciate an absurdity.

Due to the perceived deterioration of the Philippines, Bank of Montreal, including its Singapore office, had been operating since 1981 under strict orders not to place interbank deposits representing Philippine country risk. By 1983 the condition of the Philippines had deteriorated still further and it had become a country in deepening political and financial turmoil.[8] Without an understanding that the depositor was not taking country risk, Citibank could not have attracted Eurodollar deposits for booking at its office in such an unstable country by paying essentially the same rate it offered for Eurodollar deposits booked in London.[9]

Citibank has sought to create the impression that depositors bargained to receive a higher rate of interest in exchange for accepting Philippine sovereign risk. *See* 612 F. Supp. at 356. Citibank thus informs the Court that "The 10 percent interest rate paid on WFAL/Singapore's deposits with Citibank/Manila was substantially higher than the 8.85 percent interest rate payable on comparable [domestic] deposits in New York," Pet.

[7] *See* G. Dufey & I. Giddy, *The Internaitonal Money Market* 53 (1978).

[8] On June 23, 1983, the Philippines peso was devalued 7.3 percent. *Philippine Central Bank Devalues Peso*, The Associated Press, October 5, 1983 at 103 (NEXIS). The popular opposition leader, Benigno S. Aquino, Jr. was assassinated at the airport in Manila on August 21, 1983 upon his return from exile in the United States. N.Y. Times, Aug. 22, 1983, at A1.

[9] By way of comparison, in a widely reported incident, Citibank sought to book deposits in its Hong Kong branch while contractually allocating the sovereign risk on depositors. Depositors refused this term, and Citibank was forced to assume this risk or lose its Hong Kong deposits. *Citicorp Selling CDs in Hong Kong*, American Banker, Nov. 14, 1989, at 10.

Br. at 8, that depositors "search for the most attractive terms they can find," Pet. Br. at 5, that depositors "conclude that it is to their advantage" to place money in a foreign branch, Pet. Br. at 4, and that Wells Fargo "has taken what the foreign market offered, including opportunities for higher returns subject to the political and economic risks present abroad." Pet. Br. at 34. The exact opposite of what Citibank contends is true. To be sure, Eurodollar deposits at the pertinent time commanded a higher rate of interest than did domestic deposits in retail branches of Citibank in New York. But as the district court found, the rates quoted for Eurodollar deposits were identical without regard to the identity of the country in which the branch booking them was located; in other words, the rate in London, a stable banking center, was the same as the Manila rate. *See* 612 F. Supp. at 352, 356 n.2; 660 F. Supp. at 950. Thus, the interest rates prevailing in the market show that like *amici* other sophisticated depositors did not understand that by placing deposits through a foreign branch of a United States bank they were accepting branch country risk.

Actions subsequent to the booking of *amici*'s deposits confirm this point. For example, for a month *after* the Philippine central bank issued MAAB 47, but *before* Citibank announced that it was refusing to repay the deposits of its Philippine branch as they came due, new interbank deposits continued to be booked through the Philippine office of Citibank.[10] It is difficult to believe that sophisticated institutional depositors would continue to place deposits with the Manila office of Citibank after the exchange restrictions were in place, if they had the understanding that they bore Philippine sovereign risk.

[10] *Philippines Central Bank to Allow Citibank to Use Some Frozen Money*, American Banker, April 24, 1984, at 16 (NEXIS).

Moreover, if Citibank is correct that the marketplace understood that depositors would bear booking-branch country risk, why did other banks operating in the Philippines pay off depositors [11] and Citibank's move shock the international community? [12] As the highly respected London *Financial Times* put it in April of 1984, "the affair looked potentially historic in its implications if the Citibank decision [not to repay its deposits] was upheld, since it could influence patterns of Euromarket lending and thus affect all but the most dependable offshore banking centers. Many preconceptions have already been shaken." [13] The trial court noted a similar reaction. Tr. at 990.

Citibank suggests that—despite overwhelming evidence to the contrary—depositors got a premium for accepting Philippine country risk, and must have known that Citibank was only willing to pay this higher rate because Citibank, under the authority of a 1970 Interpretation of Regulation D, was not reserving against the deposits on the basis that depositors had contractually agreed to bear sovereign risk. *See* Pet. Br. at 34. The understandings of the parties and whether they were affected by an understanding of Regulation D or any other U.S. regula-

[11] The three other international banks affected by the Philippines decree—Bank of America, Hong Kong & Shanghai Bank, and Standard and Chartered Bank—each fully repaid the deposits of their Philippine branches. *Banks To Push For Payout Of Manila Deposits*, The Financial Times, April 25, 1984 § I at 20 (NEXIS); *Wells Suit Revives Jurisdiction Issue*, American Banker Mar. 2, 1984, at 1 (NEXIS); United Press International, Feb. 1, 1984 (NEXIS).

[12] *See, e.g., Banks To Push For Payout Of Manila Deposits*, The Financial Times, April 25, 1984, § I, at 20 (NEXIS); *Manila Frees $100m Citibank Deposits*, The Financial Times, Feb. 3, 1984 § III at 34 (NEXIS); *Citibank In Row Over Refusal To Repay Manila Deposits In $*, The Financial Times, Jan. 17, 1984 § I at 1 (NEXIS). *Citibank Continues To Press Philippines*, The Financial Times, Feb. 7, 1984 § III at 34 (NEXIS).

[13] *Philippines Sound a Sour Note*, The Financial Times, April 11, 1984, § IV, at 2 (NEXIS).

tion of Citibank's affairs is a factual matter, and was determined against Citibank at trial. 660 F. Supp. at 950. Contrary to the impression Citibank seeks to create that U.S. regulations "in essence, created the Eurodollar market," Pet. Br. at 7, the offshore deposit market was created by European banks that operated outside the jurisdiction of the United States banking regulators, and, initially, United States banks did not participate in that market. Eurodollar deposits were originated for the purpose of protecting dollar denominated funds owned by Eastern European nations from seizure by the United States during the 1950's.[14] The immense growth in the Eurodollar market is attributable to the balance of payments deficits run by the United States since the 1950's and the general acceptance of the dollar as the medium for international trade, factors which together have led to large quantities of dollars being on deposit with foreign banks.[15] Foreign banks play a significant role in this market.[16] Moreover, the Eurodollar market is but one part of the larger Eurocurrency market.[17]

In 1983, the total assets in the Eurocurrency market, excluding inter-bank claims, summed to $1,240 billion.[18] U.S. chartered banks accounted for $436 billion [19] or 35.2% of the total. By 1988, the Eurocurrency market, calculated as above, had grown to $2,390 billion.[20] U.S. chartered banks accounted for $347 billion [21] or 14.5% of

[14] E. Roussakis, *Commercial Banking In An Era Of Deregulation*, 188 (1984).

[15] *Id.* at 188-89.

[16] Swoboda, *The Eurodollar Market: An Economist's Point of View* in Prochnow, *The Eurodollar* at 295, 297 (1970).

[17] M. Stigum & R. Branch, *Managing Bank Assets and Liabilities*, 122 (1983).

[18] *See* 1989 Bank for International Settlements ("BIS") Annual Report 106.

[19] *See* 71 Fed. Res. Bull. Table 3.21 (Jan. 1985).

[20] *See* 1989 BIS Annual Report 106.

[21] *See* 76 Fed. Res. Bull. Table 3.21 (Feb. 1990).

the total. In the overall Eurocurrency market in 1988, including interbank claims, U.S. banks had only a 14.7% market share of assets and a 15.1% market share of all liabilities.[22] As of year end 1988, U.S. dollars accounted for 56% of Eurocurrency liabilities and for 52.5% of Eurocurrency assets [23] (other major Eurocurrencies being the Deutsche Mark, the Swiss franc, the Japanese yen and Sterling). The same banks place and accept these "Euro" deposits denominated in various currencies, which even petitioner must concede do not trade on an understanding relating to U.S. law or regulation.

While disparities in national regulation may affect the ability of certain institutions to participate in the Euromarket, this does not mean that the regulations of a particular nation control the terms on which the market works.[24] On the contrary, the efficiencies of the Euromarket make it likely that differential regulation will merely have an adverse competitive impact on the banks of the country imposing such regulation.[25] Thus, the decision of the Federal Reserve Board to permit United States banks to participate in this market did not suddenly change the expectations and understandings of participants in the Eurocurrency market about who would bear country risk.

It is not clear whether market participants, many of which are not United States banks, were generally aware in 1983 of the obscure 1970 Federal Reserve Interpretation (deleted from the Code of Federal Regulations in 1980), that is said to provide the gloss on Regulation D urged now by Citibank as a basis of a preemptive federal rule governing and regulating private agreements.[26] Even if a Eurodollar depositor was aware of the Interpretation, it is not clear that a depositor would or should have concluded that Citibank intended to contract for repayment only at the overseas branch.[27] In any event, the Eurocurrency market was not founded upon understandings based on the United States regulation of banks, and, regardless of any federal common law created by this case, the Eurocurrency market will continue to operate based upon the agreements between parties and the usages of the international marketplace.

[22] *See* 1989 BIS Annual Report 118.

[23] *See* 1989 BIS Annual Report 116.

[24] Swoboda, *supra*, at 297, 310; Korsvik, *Legal and Regulatory Constraints Within Other Countries*, in W. Baughn & D. Mandich, *The International Banking Handbook* 734, 749 (1983).

[25] *Id.*

II. Eurodollar Deposits Are Not "by Definition" Payable Solely at a Foreign Branch

Citibank seeks to create the impression that *by definition* a Eurodollar deposit must be payable only outside the United States. Pet. Br. at 5. This is not the case.[28] At year end 1983, approximately $157 billion in liabilities were booked at bank offices in the United States through a device known as an "International Banking Facility" or "IBF." [29] This amount is almost as large as the $185

[26] *See* 52 Fed. Reg. 47,963 (Dec. 16, 1987).

[27] *Libyan Arab Foreign Bank* v. *Bankers Trust Co.*, 1 Q.B. 728 (1989) (NEXIS). In that case the court (which had before it the Federal Reserve *amicus* brief filed below in support of Citibank in this case) did not accept the suggestion that Regulation D would create the market understanding urged here by Citibank.

[28] The authorities cited by Citibank for its definition state only that Eurodollar deposits are deposits booked at banks or branches located outside the United States; they do not define Eurodollar deposits as being payable *solely* outside of the United States. *See* authorities cited at Pet. Br. n.5.

[29] 1984 BIS Annual Report, 115. Deposits at IBFs are, by regulation, exempt from reserve requirements, 12 C.F.R. § 204.8, and are statutorily exempt from FDIC insurance assessments. 12 U.S.C. § 1813(1)(5)(B). IBFs were created for the purpose of allowing "offshore" deposits to be booked in the United States, while still providing an exemption from reserve requirements and deposit insurance premiums. *See* 46 Fed. Reg. 32,426 (June 23, 1981) (statement accompanying adoption of rule exempting IBFs from Regulations D and Q). The Federal Reserve Board requires the bank maintaining the IBF to notify customers depositing

billion in total liabilities then held by U.S. banks in their offshore branches in the Cayman Islands, Panama, Hong Kong and Singapore.[30] In 1988 total assets at IBFs in the United States summed to $309 billion which is approximately 75% as large as the assets booked in the Carribean market centers.[31] These "centaurs," as the United States apparently terms them,[32] do exist. *See* 12 C.F.R. § 204.8.

An IBF is a purely conceptual device that consists merely of a set of asset and liability accounts on the books of the bank in the United States. IBFs are not branches or separate entities and IBF deposits are liabilities of the bank as a whole. F.R.R.S. § 2-309.69. IBF deposit interest rates are the same as those prevailing elsewhere in the Eurodollar market.[33]

The existence of IBFs, deposits in which even Citibank must concede are payable in the United States, demonstrates that the U.S. federal system of banking regulation does not draw a clear distinction between deposits payable in the United States and deposits payable solely outside of the United States in the application of reserve requirements and FDIC assessments.

Moreover, all parties recognize that Citibank and its Manila office are a single corporate entity and that deposits at the Philippine office of Citibank are liabilities

through the IBF of requirements applicable to such deposits—principally restricting the class of depositors to non-U.S. residents, foreign governments, off-shore branches, other IBFs and the bank establishing the IBF—and places responsibility upon the bank to make sure only deposits meeting the criteria are booked. *See* F.R.R.S. § 2-309.7.

[30] *See* 1984 BIS Annual Report 115.

[31] *See* 1988 BIS Annual Report 118.

[32] U.S. Br. 20.

[33] *Most Of The Advantages Without Leaving Home*, Euromoney, at 11 (May, 1989) (NEXIS).

of Citibank as a whole.[34] No matter how many foreign and domestic branches a national bank establishes, it has but one organizational certificate, and it is only a single legal entity. *See* 12 U.S.C. §§ 21, 22. We believe it to be the law of every state,[35] as well as the law of common law jurisdictions generally,[36] and indeed of the principal European civil law nations,[37] that a single corporation doing business through various offices not separately incorporated places all of its assets at risk for the repayment of the obligations undertaken by any and all of its offices. Indeed, the district court found that the law of the Philippines is to the same effect. 660 F. Supp. at 949. All agree that were Citibank's Manila branch to become insolvent or burn to the ground, or were all its assets to be embezzled, Citibank as a whole would still remain bound to repay, in the United States or elsewhere, the deposits booked through its Manila office. As the U.S. regulators' brief admits, U.S. Br. at 3, the clear liability of the entire entity in these cases does not violate any U.S. policy that deposits placed through foreign branches be payable only outside the United States.

Citibank now attempts to escape liability to its interbank depositors by asserting a distinction between "credit risk" and "sovereign risk." It appears to categorize sovereign risk as the risk caused by potential decrees or legislation of a particular country in which particular obligations of the enterprise are payable. The distinction Citibank draws between sovereign risk and credit risk cannot be extracted from reading Regulation D and

[34] *See* 612 F. Supp. at 252-53; U.S. Br. at 3; Pet. Br. at 20 n.26; New York Clearing House Ass'n Br. at 16.

[35] *See, e.g., Sokoloff, supra*, 239 N.Y. at 167, 145 N.E. at 919; *Chancey* v. *Citizens State Bank*, 147 S.E. 383 (Ga. 1929); *Kipp* v. *Miller*, 47 Colo. 598, 108 P. 164 (1910); *Worth* v. *Bank of New Hanover*, 122 N.C. 397, 29 S.E. 775 (1898).

[36] *See Prince* v. *Oriental Bank*, 3 App. Cas. 325, 331 (P.C. 1878).

[37] *See* Loussouran, *La Succursale, Technique Juridique du Commerce International*, in Droit et Pratique du Commerce International, 1985 Tome 11 No. 3, 359-369 (1985).

is not a meaningful distinction. For example, the 1988 Basle Accord, entered into by the bank regulators of the major banking nations, including the Federal Reserve Board, describes country risk as an aspect of credit risk.[38] The "Risk-based Capital" requirements adopted by the U.S. federal banking regulators to effectuate the Basle Accord categorize the risk of deposits placed with another bank as that of the home office of that bank, regardless of whether the deposit is booked through a foreign branch.[39]

Citibank made a credit decision to invest in the Philippines by extending credit to the government, by lending to local borrowers and otherwise participating in the Philippine economy. The Manila branch could have invested its assets either onshore or offshore; Citibank made the credit decision to have its Manila branch invest onshore. We assume it concluded it was profitable to do so, because of its relationships with the Philippine government or the Philippine Central Bank, which were large debtors of Citibank at the time,[40] or for other reasons which appeared good and sufficient to it.

The Philippines could have taken a variety of actions that would have impeded the profitability or liquidity of Citibank's Philippine operations—from altering reserve requirements or taxing at a punitive rate to imposing a moratorium on foreclosures against certain collateral.[41]

[38] Committee on Banking Regulations and Supervisory Practices, International Convergence of Capital Measurement and Capital Standards, July 1988 at 10-13.

[39] F.R.R.S. § 4-797 at nn.32, 33 (1989).

[40] In 1983, Citibank was one of the principal foreign creditors of the Philippines, and was a member of the consortium of foreign banks engaged in negotiations with the Philippines central bank at the time of the issuance of MAAB 47. *See Philippines Rescheduling Set, Citibank Acts,* American Banker, Oct. 19, 1984 at 2 (NEXIS); *R.P. Seeks 90-Day Freeze On Debt Repayments,* Jiji Press Ticker Service, Oct. 17, 1983 (NEXIS).

[41] *Cf. East New York Savings Bank* v. *Hahn,* 326 U.S. 230 (1945) (upholding a moratorium on mortgage foreclosures imposed by New York against Constitutional challenge).

Which (if any) of such governmental actions should be said as a matter of federal common law to have shifted Citibank's Philippine country risk onto its depositors?

Moreover, in other litigation involving Eurodollar deposits the United States and several of the New York Clearing House banks, including Citibank, have taken the position that because Eurodollar deposits clear through New York, they are payable in the United States and are governed by New York law.[42]

The foregoing facts undercut Citibank's argument that the "fabric" of United States banking policy is woven around the principle that overseas operations and risks of United States banks are strictly cordoned off from their domestic activities and that this policy must be recognized by the marketplace as fully as if it were an explicit, contractual limitation upon Citibank's obligations.

III. Regulation D Does Not Seek To Alter Contractual Agreements

Having lost on the law and the facts below, Citibank now asks this Court to pronounce and retroactively apply new rules of federal law.[43] Below, Citibank presented Regulation D as an evidentary indication of the market understanding that depositors bore sovereign risk. 660 F. Supp. at 950. Here, Citibank claims that Regulation D demands a federal policy of country risk allocation that must be protected by creation of principles of federal common law. Pet. Br. at 16. Regulation D operates on

[42] *See Libyan Arab Foreign Bank* v. *Bankers Trust Co.,* 1 Q.B. 728 (1989); *Libyan Arab Foreign Bank* v. *Manufacturers Hanover Trust Co.,* 1 Lloyd's Rep. 608 (1989); *Bank Markazi Iran* v. *Citibank,* Trib. gr. inst. Paris April 23, 1980, reprinted in 1980 Iranian Assets Litigation Reporter, 968-75 (June 6, 1980). Counsel for Citibank conceded at trial that Citibank had taken this position in these cases. Tr. at 772-23.

[43] Apparently, Citibank's first proposed new rule, that only an "express agreement" can allocate sovereign risk to the deposit-taking bank, would require the express agreement to be in writing. *See* Pet. 13, 26, 47.

the United States bank taking the deposit. It hardly seems an appropriate foundation on which to erect the superstructure of a federal common law rule defining the rights and duties of other parties placing deposits with the United States bank—including, like certain of the *amici*, foreign banks that are not governed by Regulation D in their own deposit-taking activities.

The cost and burden of compliance with Regulation D and FDIC insurance premium assessments fall on the deposit-taking bank, not the depositor. *See* 12 C.F.R. § 204.7 (penalties for violation apply to deposit-taking bank). Citibank's obligation to meet reserve requirements turns upon the agreement it makes with depositors. *See* 12 C.F.R. § 204.2(t). In short, the reserve requirements of Regulation D are applicable to Citibank as the deposit-taking institution, rather than to the depositor. It would seem reasonable that Citibank should bear the affirmative burden of making its own deposit contracts clear in order to meet the exemption from reserve requirements provided to it by 12 C.F.R. § 204.1 (c)(5).

In its *amicus* memorandum to the district court below, the Federal Reserve Bank of New York explained that in the event of an ambiguity in the documentation of the agreement, the Federal Reserve Bank for its regulatory purposes, determines whether a deposit is repayable solely at the foreign branch based upon an examination of the various facts and circumstances surrounding the deposit transaction.

> In order to determine whether "by agreement" the deposit is payable only at an office outside the United States, the New York Fed must determine what the agreement of the parties provides. If the deposit's documentation does not explicitly state a legal place of payment, thus creating a level of ambiguity as to whether the United States office had "guaranteed," or has, voluntarily assumed liability and by which law the deposit is governed, the requirement of Regulation D could still be satisfied. The New York Fed will use extrinsic aids to interpretation where the parties' agreement is ambiguous, applying a conflicts of law "substantial contacts" analysis.
>
> Memorandum of Law of Federal Reserve Bank of New York As *Amicus Curiae*, 84 Civ. 996 at 11-12 (S.D.N.Y. filed Jan. 9, 1987) (citations omitted).

It is clear from the Federal Reserve Bank's brief that in enforcing Regulation D, it has not applied a presumption that deposits are payable solely at the branch unless the parties expressly agree to the contrary. *Id.* at 10-13.

In fact, the Federal Reserve in 1986 urged banks to state on all Eurodollar deposit documentation that the deposit was payable solely overseas and at least one bank, as reported in the *Libyan Arab* case in the United Kingdom, sought to adopt the practice in order to ensure that the deposits will remain exempt from reserve requirements.[44]

This Court has held that for a federal regulation to preempt state law, the federal agency, when adopting the regulation, must have intended to preempt state law, and that such preemption must be within the statutory grant of power.[45] Here, Regulation D was not intended

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[44] *Libyan Arab Foreign Bank* v. *Manufacturers Hanover Trust Co., supra*, at 624. "Indeed, it is plain from the evidence that the decision to imprint the stamped legend arose not through any change of attitude by MHT, but as a result of specific pressure from the Federal Reserve Board, as described in a memorandum circulated by the MHT management on July 31, 1986, under the heading 'Deposits at branches of MHT outside the USA' (10A/132):

> Under pressure from the FRB, BIS management has decided that all advices, confirmations, certificates—more generically, any document which evidences a deposit liability of an MHT branch outside the USA—must include the legend, 'This Deposit or Placement is payable at [foreign branch].'
>
> If we don't comply, the FED takes the position that these deposits are subject to Reserve Requirements."

[45] *Fidelity Fed. Sav. & Loan* v. *de la Cuesta*, 458 U.S. 141, 154, 158-59 (1982).

to preempt the law governing deposit contracts.[46] Indeed, by its express terms, Regulation D builds on the understanding of the private parties as to the place of repayment of the deposit; it does not purport to control or dictate what that private understanding is. *A fortiori*, the Federal Reserve Board's "interpretive rules" could not have such a prescriptive effect on private agreements. Moreover, interpretive rules, such as the 1970 Interpretation on which Citibank relies so heavily, normally are not considered to have preemptive effect.[47] Significantly, the Federal Reserve Board deleted the 1970 Interpretation on which Citibank relies for its preemption argument from the Code of Federal Regulations in 1980 and did not repromulgate it until December 1987,[48] and thus the Interpretation was not "on the books" in 1983.[49] Notably, the United States does not claim federal

[46] The comments submitted by Citibank and the New York Clearing House in response to the 1980 Rulemaking Notice indicate their understanding that the regulation was not intended to preempt contracts law. *See*, Letter from New York Clearing House to New York Federal Reserve Bank at 19-20 (July 15, 1980); Letter from Patrick J. Mulhern, Citibank to Federal Reserve Board at 3 (July 15, 1980) (both contained in Federal Reserve Board Rulemaking Docket No. R-0306).

[47] *See Perdue* v. *Crocker Nat'l Bank*, 38 Cal. 3d 913, 935-36, 216 Cal. Rptr. 345, 360-61; 702 P.2d 503, 518-19 (1985), *appeal dismissed for want of jurisdiction*, 475 U.S. 1001 (1986). *Accord Guardian Federal Sav. & Loan Ass'n* v. *FSLIC*, 589 F.2d 658, 664-65 (D.C. Cir. 1978).

[48] 52 Fed. Reg. 47,693 (Dec. 16, 1987). The Interpretation was not readopted until December of 1987. Reference to Interpretation 204.112 remained in a former interpretation of Regulation Q regarding interest rate restrictions, at 12 C.F.R. § 217.146. 52 Fed. Reg. 47,693 (Dec. 16, 1987). Since 1973, deposits in excess of $100,000 (which would include all Eurodollar deposits) have been exempt from the interest rate limits of Regulation Q. *See* 38 Fed. Reg. 13,728 (May 25, 1973). Thus the precursors to 12 C.F.R. § 204.128(c) were not applicable to Eurodollar deposits in 1983.

[49] Similarly, the argument that the exemption from FDIC insurance premiums for deposits booked in offshore branches and IBFs requires a federal rule of presumption on the contractual

law—whether regulatory or common law—governs the outcome of this case.[50]

If there in fact was an agreement that the deposit here was to be repaid in New York—as quite clearly there was—it would be a *coup de main*, and not the establishment of a rule of law, to say that simply because Citibank chose not to put up reserves against the deposit, that agreement had to be ignored. Such a rule is an inappropriate transmutation of a regulatory requirement, imposed by the United States regulatory agencies on a bank supervised by them, into a governance of a private agreement between a depositor and the bank.

It is possible that the record may suggest that Regulation D may not have been consistently or thoroughly enforced by the banking regulatory agencies at all pertinent times. Perhaps this was a way of fostering U.S. bank participation in the Eurodollar market. *Cf.* Pet. Br. at 7. In any event, the answer is not to enforce the regulation retroactively upon international depositors by binding them with a presumption as to what their intentions were.

intent of the parties lacks merit. The situation in which the interest of protecting the deposit insurance fund is most clearly implicated—the insolvency of the bank as an enterprise—is the precise situation in which all agree that the main office would be liable for the deposits of its overseas branches.

[50] U.S. Br. at 10. The statutory language at 12 U.S.C. § 632 identified by Citicorp as providing statutory authority for this Court to create federal common law, Pet. Br. at 39, is revealed by the United States for what it really is, a jurisdictional provision. U.S. Br. at 10 n.8. *Cf. Coit Indepedence Joint Venture* v. *FSLIC*, 109 S. Ct. 1361, 1371, 1375 (1989) (so interpreting similar provision in Federal Home Loan Act). A jurisdictional provision does not of itself grant authority to create federal common law. *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). As a general matter, contracts entered into by national bank are governed by state law. *Perdue*, 216 Cal. Rptr. at 362; *accord*, *Bank of America* v. *Parnell*, 352 U.S. 29, 32-34 (1956).

IV. Citibank Asks This Court to Create a New, Unprecedented Federal Common Law

The record below and the market understanding amply demonstrate that Citibank's depositors did not contract to bear Philippine country risk. However, assuming for the sake of argument that depositors contracted to assume the risk that the Philippine government might seize or freeze deposits at the Citibank Manila branch, it is clear, as the district court found below, that Philippine law did not freeze the deposits or excuse Citibank from repayment. At most, all that MAAB 47 required was a request to the central bank by Citibank to repay depositors. When Citibank finally made this request in the spring of 1984, it became apparent that MAAB 47 did not freeze the deposits and merely prohibited liquidation of local Philippine assets in order to pay deposits booked at the Manila branch. Although other banks operating in the Philippines paid their depositors, Citibank's primary complaint now appears to be that Philippine law did not go far enough, and it requests this Court to create Federal law to go further than the Philippine law, so as to justify Citibank's repudiation of its obligations. Pet. Br. at 41.

The district court, applying Philippine law at the invitation of both parties, held that it did not preclude the payment of Wells Fargo by Citibank but, only prohibited Citibank's Manila office from liquidating certain assets located in the Philippines to obtain the funds for repayment. 660 F. Supp. at 950.[51] Citibank now does not

[51] Citibank has argued consistently that Philippine law controls the deposits, yet as a matter of litigation strategy it offered only minimal evidence on this point, chose not to refute Wells Fargo's testimony, and decided not to request a rehearing from the district court. 660 F. Supp. at 949; Pet. App. at 14A. Wells Fargo, while taking the position that New York law applied, argued that even if Philippine law were applied, MAAB 47 did not prohibit, or would not on request be construed as prohibiting, Citibank from repaying its deposits from its worldwide assets located outside of the Philippines and thus Citibank was not excused from its breach of the deposit contract.

Despite the suggestion of the United States, U.S. Br. at 22, Citibank does not request this Court to remand on the basis that the findings of Philippine law below were clearly erroneous. Perhaps Citibank, a party intimately familiar with the case, has not requested this step because it must understand that it will lose the case if Philippine law is applied.

wish the Court to apply Philippine law but to create out of whole cloth a new federal law which provides that if foreign law freezes local assets but does not preclude repayment of deposits utilizing assets outside the foreign country, federal law will escalate that local action by treating it as precluding payment altogether. This new federal law would operate to effectively freeze the deposits booked through a branch located in that country and thus relieve the United States bank of its contractual obligation to repay. Pet. Br. at 41. We have heard of contentions that, colloquially, a course of action made one "holier than the Church." The present contention appears to be that a federal law should be created that makes acts "wickeder than the Devil."

It would seem to be an extraordinarily doubtful public policy to enact legislation which escalates a partial local interference with banking liquidity into a major interference not prescribed or complicated by the local authority.[52] Whatever the wisdom of such a rule, one would expect that it would be more properly debated in Congress—or perhaps solely in the Senate, upon negotiation and submission of an international convention on the subject if other countries agreed with it—rather than be fashioned by this Court.

[52] This new rule would provide a level of protection for United States international banks such as Citibank from foreign sovereign action that goes further than any legislation currently in effect, including New York Banking Law Section 138. The alleged justification for the new rule does not relate to this case, but to what might happen in other, future situations. Pet. Br. at 44.

V. The Alleged Policy Concerns Are More Appropriately Addressed by Rulemaking, Legislative Action or Private Contract

The United States (which apparently concedes that this is not an appropriate case for federal preemption or federal common law, U.S. Br. at 10) and Citibank (which frames its entire argument on federal preemption and federal common law) present several policy issues allegedly raised by this case. To the extent these hypothetical issues are concerns at all, we submit they are more appropriately addressed by legislation, international convention, or regulatory action or by contract, than through the creation of novel federal rules by this Court.

If repayment instructions create an understanding on country risk contrary to the deposit-taking bank's wishes, or impose a reserve burden on the deposit-taking bank, banks taking Eurocurrency deposits can avoid the problem by express agreement that the deposits are repayable solely at the branch.[53] Thus, Citibank could tell depositors at the time of contract and state on its confirmations that the depositor assumes the risk of sovereign action by the country through which the deposit is booked. At a slightly more sophisticated level, Citibank could enter into "master agreements" with the other major participants in the interbank deposit market setting forth the terms of deposits and allocating various risks between the deposit-taking bank and the depositor. Such agreements are already in use in other interbank markets, such as the foreign exchange trading market and

[53] *Cf. Braka* v. *Bancomer*, 762 F.2d 222 (2d Cir. 1985); *Callejo* v. *Bancomer*, 764 F.2d 1101 (5th Cir. 1985).

Citibank seeks to disparage the effectiveness of the contractual terms reflected in the confirmations exchanged between the parties by saying that the obligation to repay the agreement in New York could be unilaterally varied by the depositor at any time. Pet. Br. at 49. This is not the experience of *amici* and is inconsistent with a proposed international bank payment standard that is pending final approval by the International Organization for Standardization in Geneva, Switzerland, ISO/DIS 9778 (1988).

the market for interest rate and currency swaps. The Bank for International Settlements in Geneva, Switzerland expects a major change in the interbank funds market towards the adoption of group netting agreements and clearing arrangements, rather than individual transaction-by-transaction contracting by banks,[54] which agreements could allocate sovereign risk through rules arrived at by group consensus. Fixing the contract terms through open, advance, private negotiation or well-described and publicized policies of the depository bank subjects those terms to the force of the marketplace. If other market participants have different terms, depositors may well choose to patronize them. Indeed, market experience demonstrates that the terms proposed by Citibank will not be acceptable to depositors.[55] The market has ceased placing deposits booked at high-risk locations except where the deposit-taking bank does not seek to place branch country risk on the depositor. Apparently this is why Citibank prefers to have the matter handled by retrospective "federal common law" rules.

Citibank identifies the policies that support its proposed federal common law rules as the following four:

> ensuring that foreign branches of U.S. banks can compete in foreign markets; protecting the safety and soundness of the U.S. banking system; promoting the international Eurodollar market; and having the regulation and operation of financial markets—which depend on the distinction between domestic and foreign deposits—proceed under stable and predictable rules. (Pet. Br. 14-15.)

First, it is far from clear how such rules would ensure that overseas branches of U.S. banks can compete in foreign markets. If the overseas branches of Japanese, German and British banks are not "protected" from their global depositors by rules such as those Citibank requests,

[54] *See* BIS, Report on Netting Schemes 21 (1988).

[55] *Citicorp Selling CDs in Hong Kong*, American Banker, Nov. 14, 1989, at 10.

one would think they could compete much better for deposits than U.S. banks. Depositors, after all, presumably will go to the banks that will afford them the best chances of repaying their deposits. *Second*, it is hard to see how the proposed rules would "promote the international Eurodollar market"; they would of course make it easier for U.S. global banks to refuse to honor their obligations but many would contend that this would have an *adverse* effect on the international Eurodollar market. *Third*, as to "having the regulation and operation of financial markets . . . proceed under stable and predictable rules," it is hard to see how such a rule, applicable only to U.S. banks, which comprise only two of the top 50 banks worldwide, would promote the operation of worldwide financial markets. It would rather, more likely, introduce a "wild card" into the hands of the U.S. banks, and other banks might choose not to do business with them under those circumstances. *Fourth*, as to "protecting the safety and soundness of the U.S. banking system," rules which permit the repudiation of Eurodollar obligations might improve Citibank's financial condition in the short term, but otherwise the prognosis is not so clear. Since 1983, the Eurodollar market has reacted in response to Citibank's refusal to pay these deposits—which imposed a *de facto* risk upon depositors—by halting the flow of Eurodollar deposits to all but bank offices located in the most stable countries. Branches located in more exotic locales are now funded locally or internally, or, as with Citibank's office in Hong Kong, by deposits not limited to repayment from branch assets.[56] The rules contended for by Citibank thus appear to be highly doubtful on their own merits, putting aside the more important considerations of the appropriateness of the exercise of the power by this Court to promulgate them.

The practical efficacy of such rules of federal common law even if promulgated may be open to question. The

[56] *Citicorp Selling CDs in Hong Kong*, American Banker, Nov. 14, 1989, at 10.

banks which are players in the interbank Eurocurrency deposit market are largely foreign. There certainly would be no assurance that a court in London or Paris where Citibank has branches would choose to apply exonerating rules of "federal common law." The English and French precedents cited by Citibank do not in fact suggest that those countries have rules which would have relieved Citibank from payment in the situation here.[57]

If some form of federal lawmaking is nonetheless deemed appropriate, there are more conventional and appropriate ways to go about it. To the extent that it has statutory authority to do so, the Federal Reserve Board could adopt—after the notice and comment procedure required under the Administrative Procedure Act

[57] The "branch payable" rule mentioned by the United States in its brief at 13-15, is, as Judge Knapp correctly noted below (Pet. App. at 19a n.6) not applicable to a deposit, such as those at issue in this case, in which there is no demand requirement under the terms of the deposit contract. The seminal case on this rule, *Joachimson* v. *Swiss Bank Corp.*, 3 K.B. 110, 129-30 (1921), clearly indicates the rule is predicated on the requirement that *demand* be made and "wrongfully refused" at the deposit-taking branch before the bank as an entity is liable to repay a deposit. However, it is recognized that an agreement to the contrary can be entered into. Citibank agreed to the contrary by entering into a contract that clearly required *no* demand to be made. The only place for performance of Citibank's obligations was in New York and that is the law that governs.

Thus the *Joachimson* case cited by Citibank, *see* Pet. Br. at 32 n.45, turns upon a contractual demand requirement not existing in the present case, as well as upon communications and funds transfer difficulties of that era that are no longer relevant. More recent English cases treat this precedent as a factor in a choice-of-law analysis, not as a rule of presumption on contractual intent as to sovereign risk allocation. *See Libyan Arab Bank, supra*, 1 Lloyd's Rep. 608. The French cases cited involved Vietnamese currency deposits made by Vietnamese residents in Vietnamese branches of French banks, and reflect the contacts analysis of French choice of law rules. Affidavit of Professor Monique Contamine-Raymond sworn to April 9, 1987 (submitted as Exhibit B to plaintiff's post-trial brief below). On other facts, branch country law might well not be applied by a French court. *See Bank Markazi Iran* v. *Citibank, supra*.

for changes in substantive law—a regulation which provides for allocation of risk to the depositor in the absence of an agreement to the contrary. The average maturity of Eurodollar deposits is short, with most deposits maturing in six months or less.[58] The United States agencies signed on the Solicitor General's brief have had over six years since 1983 to prepare such a regulation, and apparently they all claim that it would be beneficial. Why have they not simply promulgated and adopted such a regulation? If more statutory authority is needed (in which case Citibank's Regulation D preemption argument cannot prevail here), the agencies can suggest legislation to Congress, as they so successfully have done many times in recent memory. It is not clear why this Court should support a deliberate bypass of the processes set forth at least in the Administrative Procedure Act for enactment of substantive and retroactive changes in the law. Moreover, Citibank's policy arguments are more appropriately addressed by Congress, or by the United States agencies with whatever statutory authority they may have, than by the courts.[59] If rules were made in this fashion—by the legislative branch or the appropriate Executive agencies under their delegated power—the responsibility for a rule that impaired the United States position, or that of its banking institutions in the global marketplace, would fall on the branches of government charged with such policy matters. This clearly would be a preferable solution to making such rules through judicially promulgated "federal common law" in a thicket where consideration beyond issues normally dealt with by the courts are presented.

* * * *

[58] E. Roussakis, *Commercial Banking In An Era Of Deregulation* (1984), at 190.

[59] *Boyle* v. *United Technologies Corp.*, 108 S. Ct. 2510, 2528 (1989) (dissents of Brennan, Marshall, Blackmun, and Stevens, JJ); *Texas Indus., Inc.*, 451 U.S. at 646-47; *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980).

In its aggressive plan to book deposits in its Manila branch in 1983, Citibank obtained substantial deposits at the worldwide Eurodollar rate—the same rate payable for deposits booked at its London branch and in other stable overseas financial centers. It now wants to get something it never bargained for—inexpensive deposits payable only out of the liquidatable assets of a branch in a high-risk, third-world country.

To achieve this inelegant objective, Citibank urges this Court to reverse the two lower courts by creating two extraordinary rules of federal common law. The first is that various federal regulations designed to regulate Citibank somehow influence and prescribe the terms of private agreements respecting Eurodollar deposits. The second contention is that where a foreign sovereign power imposes a restriction which affects the assets or liquidity of a branch of a national bank, a federal law must be created which escalates that prohibition into a prohibition against paying any deposits booked through that branch. Neither rule of "federal common law" appears to be substantively appropriate; and in any event for this Court to promulgate any such rule would go far beyond the accepted understanding of the areas in which the courts may establish rules of "federal common law".[60]

[60] We note that while the U.S. banking agencies nominally support Citibank in urging reversal, they do not go with it in urging adoption of these rules of federal common law. U.S. Br. at 10. But for the reasons developed above, unless such rules were to be promulgated, the judgment of the Court of Appeals must be affirmed.

CONCLUSION

For the reasons stated herein, Bank of Montreal, Maryland National, Credit du Nord and The Toronto-Dominion Bank urge that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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